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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 201

SUNRAY OIL CORPORATION,

Petitioner,

v.

G. T. ALLBRITTON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUNRAY OIL COMPANY,

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v.

G. T. ALLBRITTON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 15, 1951 (R. 416) and the order entered on April 26, 1951, denying rehearing (R. 432).

Opinions Below

The opinion of the district court (R. 374) is reported in 88 Fed. Supp. 54. The cause was first submitted to a three-judge court sitting in New Orleans which did not agree and set the same down for re-argument before a five-judge court *in banc* sitting in Fort Worth. The first opinion (R. 401) and the dissenting opinion (R. 404) of the Court of Appeals are reported in 187 Fed. 2d 475, and the opinions re-

flect a three to two decision. The second of the Court of Appeals (R. 420) and the dissenting opinion (R. 422) are now reported in Volume 188 Fed. 2d 751, and these opinions likewise reflect a three to two decision. These opinions of the Court of Appeals are set forth in Appendix "B" hereto attached and made a part hereof. A reading of the dissenting opinions makes manifest the imperative necessity of granting this petition for writ of certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on February 15, 1951 (R. 416). A petition for rehearing was filed on March 6, 1951 (R. 417), and was denied on April 26, 1951 (R. 418). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1). This petition is presented July 25th, 1951.

Questions Presented

1. Whether the new judicial code which went into effect September 1, 1948, now permits the review by a Court of Appeals of fact issues such as a verdict awarding excessive damages, after trial by a jury.

2. Whether this court should, in the light of present day legal research review its holding that the common laws did not provide for an appellate review of fact issues such as excessiveness of damages.

3. Whether this court should now say that the Seventh Amendment, designed to preserve the substance and not the mere form of jury trial, prohibits a review of fact issues after jury trial when they are questioned in a Court of Appeals.

4. Whether in this case there was an abuse of judicial discretion precluding the uniformity of results expected by this court regardless of whether a case be tried in the State Court or in the Federal Court.

5. Whether the courts below in this case tried in the Federal Court because of diversity of citizenship followed the substantive law of the State of Texas on the question of liability.

6. Whether the courts below in this case tried in the Federal Court because of diversity of citizenship of the parties followed the substantive law of the State of Texas on the amount of damages recoverable in a suit such as this.

7. Whether the courts below in this case tried in Federal Court because of diversity of citizenship of the parties followed the substantive law of the State of Texas on the question of casual connection.

Statutes Involved

Pertinent statutory provisions are printed in Appendix "A", infra, pp. 20-21.

Statement

Based on diversity of citizenship (R. 3) this case seeking damages for personal injuries under the laws of the State of Texas was brought in the Federal Court, but a jury verdict was returned and approved by a visiting judge for damages [1] greatly in excess of any amount which has been upheld by the State Courts. While the defendant has contended that under the substantive law of Texas [2] it was

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[1] $125,000.00 (R. 553). This was reduced on appeal by $13,084.70, representing workman's compensation payments made to plaintiff, which he was not entitled to recover under the Texas law.

[2] As set forth in *Southern Oil Co.* v. *Church*, 74 SW 797, 75 SW 817 (writ of error refused by the Texas Supreme Court) holding that in Texas the employer of an independent contractor, such as defendant, owed no duty to an employee of the independent contractor, such as plaintiff, with respect to negligence in the furnishing of an oil derrick for use by the independent contractor. The only duty owed under the Texas law is not to willfully injure such employee or to furnish him instrumentalities known to be defective or inherently dangerous. On this point the Texas Rule is different from the law of other states.

entitled to both a directed verdict and a judgment upon the special issues answered by the jury as their verdict, as well as judgment, notwithstanding the verdict on the question of proximate cause, interesting and serious questions of constitutional law and federal procedure with respect to the right and appellate control of trial by jury developed to the concern of both counsel and the court. After the case was argued, these questions caused the Court of Appeals, on its own motion (R. 401) to set aside the submission and have the issues re-argued before the court *in banc*. A three to two decision followed with both a majority opinion (R. 401) and a dissenting opinion (R. 404). Upon a motion for rehearing, there was an additional opinion by the majority (R. 420) and likewise by the dissenting justices (R. 422).

The majority thought the court had no power to review the question of excessiveness of damages.

The dissenting justices showed how the verdict for damages was greatly in excess of what any rational appraisal of the damages would have allowed, noted that they were in excess of any verdicts permitted to stand in similar cases tried in the state courts, and were of the opinion that the court of appeals now, for the first time in its long history, had the power and should review the question of excessiveness of damages for the purpose of ordering a new trial unless remittitur be consented to by the plaintiff.

The dissenting justices showed that the new judicial code adopted in 1948 for the first time in 150 years has removed the restriction which had previously apparently prohibited a review upon appeal of any fact issue.

The dissenting opinion also demonstrated, through long and exhaustive research, that there was never really any basis for the often repeated statements that the Seventh Amendment prevented such type of review by a federal

appellate court, and that other procedural difficulties noted by this court in *Fairmount Glass Works* v. *Cub Ford Coal Co.*, 287 US 474, 482, 53 S. Ct. 252, 254, 77 L. Ed. 439 and by Judge Learned Hand in *Miller* v. *Maryland Casualty Co.*, 40 Fed. 2d 463 (2d Cir.) no longer exist.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that it had no power to review the question as to whether the verdict of the jury was excessive as a matter of fact.

   A. The new judicial code has removed the statutory restriction upon the power to review questions of fact.

   B. Modern research has shown there never was a valid reason for prohibiting such a review upon constitutional grounds, though the courts have so stated many times.

2. In failing to hold, as urged by the dissenting justices, that the new judicial code has removed the limitation upon the powers of federal appellate courts to review questions of fact.

3. In failing to hold, as urged by the dissenting justices, that at the time of the adoption of the Seventh Amendment to the Constitution, the common law provided for an appellate review of jury verdicts found to be excessive, and that such a review should be made in the instant case, because the damages assessed were for an amount far larger than any upheld previously in the state courts.

4. In failing to hold that the trial court abused its judicial discretion in not reducing the damages assessed by the amount which they would have been reduced had the trial been in the state court.

5. In failing to apply applicable Texas decisions the

Honorable Court of Appeals for the Fifth Circuit wholly disregarded and refused to apply the Texas rules of substantive law as required by the cases of *Erie RR Co.*, v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1187, 114 ALR 1487, and *Guaranty Trust Co.* v. *York*, 326 US 99, 109; 65 S. Ct. 1464, 1470; 89 L. Ed. 2079, 160 ALR 1231, because *Texas Jurisprudence*, Vol. 23, sec. 21, p. 569, lays down the Texas rule which is based on *Southern Oil Co.* v. *Church*, 74 SWR 797; 75 SWR 817.

> "Supplying the contractor with defective appliances for use in the work may also give rise to liability, depending upon the circumstances. But to hold the employer it must be shown that an appliance inherently dangerous was willfully or knowingly supplied. The mere fact that he furnished a defective appliance does not establish liability."

6. The Court of Appeals further erred in failing to follow the substantive law of the State of Texas because the undisputed evidence having shown that the derrick over the oil well was a part of the means furnished to the independent contractor for the purpose of doing his work upon the well and without this derrick the work could not be done, and the finding of the jury that the independent contractor had control of the manner and means of doing the work necessarily established that the independent contractor had control of the derrick; therefore, it was error for the Court of Appeals to hold that the Sunray Oil Corporation retained control of the derrick. There is no permissible Texas rule or Federal rule permitting an implied finding where the jury has made an express finding.

7. The Court of Appeals erred in holding that there were issues of fact to support the finding of the jury on the question of proximate cause.

8. In holding that the defendant was liable under Texas law for the injuries sustained by the plaintiff.

9. The Court of Appeals erred in failing to follow and disregarding the Texas rule:

> "That an employer of an independent contractor who furnishes 'instrumentalities with which the contractor is required to perform the work, owes to the employees of such contractor the duty to exercise ordinary care not to furnish them appliances that are known by him to be inherently dangerous.' " (*Sun Oil Co.* v. *Kneton*, 164 Fed. 2d, 806-809, 23 Tex. Jur. 569).

and in disregarding the Texas rule that where an issue is submitted to the jury, the trial court cannot make an express finding nor an implied finding which would substitute for an express finding made by the jury to the contrary; neither can an implied finding be implied or brought forward on any matter necessarily covered by the jury findings to such issue submitted.

Reasons for Granting the Writ

(1) Subsequent to *Erie RR Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487, this court in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, 160 ALR 1231, stated that it expected the same result to follow from a trial in the Federal Court as would take place from a trial 2 blocks distant in a State Court if federal jurisdiction were based upon diversity of citizenship of the parties. That result did not follow in the instant case.

The moderated verdict was far in excess of the highest award which has ever been permitted to stand in a State Court. At the time of the trial, few verdicts in excess of $30,000.00 had been permitted to stand by the Texas Appellate Courts. *Gillete Motor Transportation Co.* v. *Whitfield*,

197 SW 2d 157; *Tri County Electric Co-Operative* v. *Clair*, 217 SW 2d 681, 686, Texas rule is there stated as follows:

> "In our consideration of the appeal in Gillete Motor Transportation Co. v. Whitfield, Tex. Civ. App., 197 SW 2d 157, opinion of the Supreme Court in 145 Tex. 571, 200 SW 2d 624, we studied the opinions in a great many reported cases, and, as pointed out in that opinion, found from the cited cases and discussions of text writers that very few verdicts in excess of $30,000.00 have been upheld, and those only in cases where the injuries were most severe. We found only two or three Texas cases in which verdicts for more than $30,000.00 have been upheld."

In fact under existing Texas laws at the time this case was tried and argued in the Court of Appeals, $62,400.00 was the highest verdict which had ever been permitted to stand in any case. *Beaumont, St. Louis & Western Ry. Co.* v. *Sterling*, 260 SW 320.[3]

Thus, the verdict permitted to stand in this case is around twice that which would have been upheld at the time of the trial had the case been tried in the State Court, some two blocks away. Thus, the first question presented is what are the Federal Courts going to do about the announced policy of *Guaranty Trust Co.* v. *York* to insure that the result of trial in the Federal Court will be the same as trial in the State Court, where the matter is one of damages. Are prior statements of divided courts limiting the power of Federal Appellate Review to be permitted to defeat the announced policy of this court that the result will be the same? Will this court overrule them or hold them no longer applicable in view of its announced policy to obtain a uniformity in results?

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[3] Since the trial, a verdict for $85,000.00 has been permitted to stand. *Thompson* v. *Barnes*, 286 SW 2d 656.

(2) Heretofore the *Judiciary Act of 1789* has prohibited a review on appeal to a federal appellate court of any issue of fact:

> "There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error, for error in ruling any plea and abatement, other than a plea to the jurisdiction of the court, *or for any error in fact.*" (Italics ours.)

RS, sec. 1101; Acts Sept. 24, 1789, c. 20, sec. 22, 1 Stat. 84; Mar. 2, 1803, c. 40, sec. 2, 2 Stat. 244; Feb. 18, 1875, c. 80, 18 Stat. 318.

The new Judiciary Code has removed that limitation or prohibition upon review and as the statute now appears there is no prohibition against review of fact issues by a federal appellate court. The new sections of the Judicial Code conferring jurisdiction on the Courts of Appeal are as follows:

28 USCA 1291:

> "The Courts of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Courts of the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

USCA, sec. 2106:

> "The Supreme Court or any other courts of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

As a matter of broad public policy to all of the Federal Courts and the lawyers and litigants appearing before them, what is this court going to determine the practice shall be? It has been contended that the new Federal Judicial Code had no intent to change the previous rules. Yet the dissenting justices demonstrate that the new code eliminated a restriction on the power of Federal Appellate Review that had stood for 150 years. Unless determined by this court, the matter will arise in about every case appealed hereafter to a Court of Appeals until such time as this court does consent to look into the question. The matter has already concerned two Courts of Appeals and in each instance the Court of Appeals has asked that the matter be submitted again for another argument before the entire court *in banc*. In addition to the opinions shown in the record in this case, see the reported cases of *Southern Pacific Co.* v. *Guthrie*, 180 Fed. 2d 295 and 186 Fed. 2d 926.

(3) While the courts have stated, though not without question, that the right of trial by jury as guaranteed by the Seventh Amendment, prevented a Federal Appellate Court from examining the question of excessiveness of damages and if found excessive, of granting the plaintiff a new trial or a remission of the excessive portion of the verdict as is generally permitted in state practice, various judges of this court, of the Court of Appeals, law professors and writers for various law reviews have shown that instead of following the common law actually allowed an appellate review of the question of the excessiveness of damages, and in light of modern research, appellate opinion and the desire to arrive at the correct interpretation of the Seventh Amendment will this Court continue to be bound by erroneous precedents, or will it re-examine this issue again, and correctly state the law.

Trial by jury has been a great institution when safe-

guarded by wise judicial administration. Yet more and more there appears a clamor in the public press to eliminate it and submit questions of fact to trained judges, medical and scientific experts. Should not this court search its soul, so to speak, to determine what course will best preserve this great democratic institution of trial by jury? If the English Common Law Courts be shown to have permitted in substance all that we ask in the nature of an appellate review by whatever name it be called, as a means of safeguarding trial by jury against its own excesses, should not this court say that it will do the same thing, especially when it is shown that the reasons previously given for refusing to do so were not supported by the foundation stated to be their basis. In fact, this court in *Kennon* v. *Gilmer,* 131 U. S. 22, 9 S. Ct. 696, 33 L. Ed. 110, upheld the granting of a conditional remittitur where it was found that the damages awarded by the jury were excessive. The pronouncements of this court in its other decisions that on appeal there is no power to review fact issues tried by a jury have not proved supportable. Mr. Justice Rutledge, in *Galloway* v. *United States,* 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458, showed the inroads made by the process of judicial erosion on the doctrine that the Seventh Amendment has prohibited any disturbance of the right of jury trial as it existed in 1791. We have found other examples where the Federal Courts have disturbed the action of a jury in awarding damages found to be excessive by decreeing that a new trial would be ordered unless the parties consented to a remittitur of some of the damages. These case fall in the following classifications:

1. *Where the trial court has abused its judicial discretion in refusing to grant a new trial in lieu of a consent to remittitur.*

Cobb v. *Lepisto,* 6 Fed. 2d 128 (9th Cir.); *Department of Water & Power of City of Los Angeles* v. *Anderson,*

95 Fed. 2d 577, 586 (9th Cir.); *Virginian Ry. Co.* v. *Armentrout*, 166 Fed. 2d 400, 408; 4 ALR 2d 1044 (4th Cir.); *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439; *Southern Pacific Co.* v. *Guthrie*, 186 Fed. 2d 926, 931 (9th Cir.) and its construction of *Affolder* v. *New York, Chicago & St. Louis RR Co.*, 339 U. S. 96, 101, 70 S. Ct. 509, 511, 94 L. Ed. 683, 688; *Chicago & NW Ry. Co.* v. *Curl*, 178 Fed. 2d 497, 502, interprets these cases to mean that where the verdict is manifestly without support in the evidence, then a refusal to set it aside amounts to an abuse of discretion; *Miller* v. *Maryland Casualty Co.*, 40 Fed. 2d 463, 465 (2d Cir.); *Detroit Transfer Co.* v. *Pratt*, 2 Fed. 2d 193 (6th Cir.); *Carter Coal Co.* v. *Nelson*, 91 Fed. 2d 651, 654 (4th Cir.); *Western Union Telegraph Co.* v. *Dismang*, 106 Fed. 2d 362, 364 (10th Cir.); *Southern Fruit Distributors* v. *Fulmer*, 107 Fed. 2d, 456, 459 (4th Cir.); *Houston Coca Cola Bottling Co.* v. *Kelley*, 131 Fed. 2d 627, 628 (5th Cir.);

2. *Where the verdict was the result of passion or prejudice.*

Larsen v. *Chicago & NW RR Co.*, 171 Fed. 2d 841, 845 (7th Cir.).

3. *To correct an absolutely plain injustice in the interest of judicial administration. Louisville & NR Co.* v. *Botts*, 173 Fed. 2d 164, 170 (8th Cir.).

4. *Where the verdict is monstrous. Affolder* v. *New York, Chicago & St. Louis Ry. Co.*, 339 US 96, 101, 70 S. Ct. 509, 511, 94 L. Ed. 683, 688, has been construed to mean that this court will now allow conditional remittitur in cases where the verdict is monstrous. See *St. Louis & W. Ry. Co.* v. *Ferguson*, 182 Fed 2d 949, 955 (8th Cir.) and *Southern Pacific Co.* v. *Guthrie*, 186 Fed. 2d 926, 931.

5. *To scan the record more closely for error. Home Ins. Co.* v. *Tydal Co.*, 152 Fed 2d 309, 311 (5th Cir.).

6. *Where the damages awarded by the jury exceeded a statutory limitation.* See dictum in *Southern Ry. Co.* v. *Bennett*, 233 US 80, 34 S. Ct. 566, 58 L. Ed.

860, discussed in *Miller* v. *Maryland Casualty Co.*, 40 Fed 2d 463, 464-5 (2d Cir.).

7. *Where the damages awarded were less than an amount the defendant did not dispute.*

Glenwood Irrigation Co. v. *Vallery*, 248 Fed 483 (8th Cir).; *United Press Ass'ns* v. *National Newspapers Ass'n*, 254 Fed 284 (8th Cir.); *Stetson* v. *Stindt*, 279 Fed 209 (3rd Cir.) discussed in *Miller* v. *Maryland Casualty Co.*, 40 Fed 2d 463, 465 (2d Cir.).

8. *Where the jury did not attempt to appraise the plaintiff's loss at all.*

Pugh v. *Bluff City Excursion Co.*, 177 Fed 399 (6th Cir.) discussed in *Miller* v. *Maryland Casualty Co.*, 40 Fed 2d 463, 465 (3rd Cir.).

9. *Where there is no evidence to support the damages awarded. Garrett* v. *Faust*, 183 Fed 2d 625 (3rd Cir.); *Virginian Ry. Co.* v. *Armentrout*, 166 Fed 2d 400, 4 ALR 2d 1044 (4th Cir.).

10. *Whereby the use of a remittitur a new trial could justly be avoided.*

United States v. *Certain Parcels of Land*, 149 Fed 2d 81-82 (5th Cir.)., *Texas Co.* v. *Christian*, 177 Fed 2d 759 (5th Cir.).

Mr. Justice Stone, in his dissent, which was concurred in by Chief Justice Hughes, Justice Brandeis and Justice Cardozo in *Dimick* v. *Scheidt*, 293 US 474, 496-7, 55 S. Ct. 296, 305, 79 L. Ed. 603, 95 ALR 1150, had the following significant statement to make about this proposition:

> "Appellate Federal Courts, although without common law precedent, have not hesitated to resort to remittitur, where by its use the necessity of a new trial could justly be avoided. *Bank of Kentucky* v. *Ashley*, 2 Pet. 327, 329, 7 L. Ed. 440; *Phillips & Colby Construction Co.* v. *Seymour*, 91 US 646, 23 L. Ed. 341; *Hopkins* v. *Orr*, 124 US 510, 515, 8 S. Ct. 590, 31 L. Ed. 523; *Washington & Georgetown RR Co.* v. *Harmon*, 147 US 571, 590, 13 S. Ct. 557, 37 L. Ed. 284; *Hansen* v. *Boyd*, 161 US 397, 411, 412, 16 S. Ct. 571, 40 L. Ed. 746."

Also see *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 US 41, 15 S. Ct. 751, 756, 39 L. Ed 889.

11. *The instructed verdict and judgment, notwithstanding the verdict.*

The development and allowance of an instructed verdict are reviewed in *Galloway* v. *United States*, 319 US 372, 401-405; 63 S. Ct. 1077, 1093-1095; 87 L. Ed. 1458. Originally this court refused to permit a motion for judgment notwithstanding the verdict. *Slocum* v. *New York Life Insurance Co.*, 228 US 364, 33 S. Ct. 523, 57 L. Ed. 879. At the time of the adoption of the new rules of Federal Procedure the matter was specifically presented to this court and this court approved the adoption and formation of *Rule 50-B of the Federal Rules of Civil Procedure* which now expressly permit a judgment notwithstanding the verdict. See address of William D. Mitchell, *Federal Rules of Civil Procedure and Proceedings of the American Bar Association's Institute, Cleveland, 1938*, pages 314-315.

For our Federal Courts to say that a verdict is too high but they cannot do anything about it, as they did in *Scott* v. *Baltimore & Ohio R.R. Co.*, 151 Fed. 2d 61, 64 (3rd Cir.), or that they must "scan the record more closely for error", as said in *Home Ins. Co.* v. *Tydal Co.*, 152 Fed. 2d 309, 311 (5th Cir.), is to use the express from our part of the country, "merely beating around the bush", or "raising fox fire." All this Court has to do is to look to its own thoughts in *Funk* v. *United States*, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369, 93 ALR 1136, where this Court said:

". . . we conclude that the dead hand of the common law of 1789 should no longer be applied in such cases as we have here. . . .

"The public policy of one generation may not, under changed conditions, be the public policy of another. . . .

"That this court and the other Federal Courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist, we think it not fairly open to doubt. . . .

"This flexibility and capacity for growth, and adaption is the peculiar boast and excellence of the common law . . . and as it was a characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. . . .

"One of its oldest maxims was that where the reason of a rule ceased the rule also ceased, and it logically followed that *when it occurs to the court that a particular rule has never been founded upon reason, and that no reason existed in support thereof, that rule also ceased.*" (Italics ours.).

There has been a trend among the courts and legal writers to do something about a change in this rule, which the dissenting judges, in their opinions, have demonstrated had no basis. Mr. Justice Stone's dissent in *Dimick* v. *Scheidt*, 293 U. S. 474, 489, 55 S. Ct. 296, 79 L. Ed. 603, 613, 95 ALR 1150 was concurred in by Chief Justice Hughes, Justice Brandeis and Justice Cordozo, and it was there said:

"If the effect of what is now decided is to liberalize the traditional common law practice so that the denial of a motion for a new trial, made on the ground that the verdict is excessive or inadequate, is subject to some sort of appellate review, the change need not be regarded as unwelcome even though no statute has authorized it."[4]

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[4] The statute now authorizes such a review, by virtue of the fact that the Judicial Code (Title 28 USC) was revised and went into effect September 1, 1948.

From *Southern Pacific Co.* v. *Guthrie*, 186 Fed. 2d 926, 929, (9th Cir.) upon motion for rehearing before the court *in banc*, we find the court saying:

> ". . . but we think the present trend of authoritative decision is in the direction of the rule in our *Cobb* v. *Lepisto* case."

Then in *St. Louis S. W. Ry. Co.* v. *Ferguson*, 182 Fed. 2d 949, 955 (8th Cir.), we find the court saying:

> "It may be that a change in the rule is desirable to allow a general review of the question of excessiveness such as is the practice in many state appellate courts, or with a more restrained sense of responsibility perhaps to permit the judgment to be passed upon whether there has been an abusive discretion of the trial court in refusing to set aside a verdict on motion for new trial."

Mr. Justice Learned Hand in *Miller* v. *Maryland Casualty Co.*, 40 Fed. 2d 463, 465 (2d Cir.) had the following to say:

> "That it might be desirable to give such an appeal, we do not deny. . . . To decide cases by such tenuous unrealities seems to us thoroughly undesirable; parties ought not to be bound by gossamer strands; judges ought not to engage in scholastic refinements. Until the practice is frankly changed, we must adhere to it as it exists."

We thus find the dissenting judges in this case, the entire court in *Southern Pacific Co.* v. *Guthrie* (9th Cir.) and the opinion of Mr. Justice Learned Hand (2d Cir.) in *Miller* v. *Maryland Casualty Co.*, crying out for a change in this rule. However, long before these courts were aroused, Dean Roscoe Pound, in an excellent article in 1910, much of which has found its way into our present rules of civil procedure, advocated the same thing by writing:

> "Upon appeal, in any sort of case, the court should have full power to make whatever order the whole case

and complete justice in accord with substantive law may require, without remand, unless a new trial becomes necessary."

The dissenting justices indicated and we earnestly submit to this Court that this suggestion of Dean Pound is now fully contained in the new *Judicial Code in sec. 2106.* In that same article Dean Pound demonstrated that our Supreme Court in *Parsons* v. *Bedford,* 3 Pet. 433, had made a mistake in interpreting the common law and that we have not followed the common law, though we have professed to do so, when the statement was made that the common law did not permit a review of an appellate court of facts that had been tried before a jury. We quote as follows:

> "At common law, after trial at nisi prius, the cause was heard by the court *in banc* upon rule for a new trial or motion in arrest or for judgment non-obstante.
>
> "In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure. Unhappily, the other has been followed."

Since writing his dissenting opinions in the instant case, Mr. Justice Holmes has retired. But we submit that he has left a judicial monument when he reviewed Dean Pound's history of this jurisprudence and then makes the following conclusions:

> "This failure to follow the simple procedure of the common law in treating the motion for a new trial as an independent proceeding of an appellate nature may be called the greatest procedural error in the judicial history of the United States."

Other legal writers have made statements similar to that of Dean Pound and the dissenting justices in *Dimick* v. *Scheidt,* 293 U. S. 474, 489, 55 S. Ct. 296, 302, 79 L. Ed. 603, 613, 95 ALR 1150. Articles to similar effect may be

found in *26 Yale L. J. 94, 57; 1 University of Chicago Law Review 111; 98 University of Penn. Law Review 575, 578; 20 Journal of the American Judicature Society 130, William Word Blume, Review of Facts in Jury Cases—Seventh Amendment; 20 Tulane Law Review 276.*

In further support of petitioner's reasons for granting the writ, we respectfully refer to Appendix "C" which is attached hereto and made a part of this petition. This is a memorandum which was furnished counsel for both petitioner and respondent after the case was first submitted and prior to the rendition of any opinion.

Conclusion

The foregoing reasons for granting this writ demonstrate that: (1) The Court of Appeals has decided an important question of Federal practice which has not but should be settled by this Court in view of the passage of the new Judicial Code. (2) The judgment of the Court of Appeals should be reviewed since it is based upon the dictum of this Court in *Parsons* v. *Bedford,* 3 Pet. 433, after which followed a construction of the Seventh Amendment to the Constitution that never had any basis in fact to support it. There have been so many exceptions engrafted upon the rule that it has not only proved to be unsatisfactory, but modern opinion and research call for its overruling both to achieve justice and because the dictum never had any foundation upon which it could in truth be based. (3) The Court of Appeals has conflicted with the rule of substantive law applied by the Texas Courts as to the liability of the defendant under the facts of this case, and, moreover, has allowed damages far in excess of what would be sanctioned in Texas, the result being that instead of having the uniformity of result expected by this Court under *Guaranty Trust Co.* v. *York,* we find one rule of substantive law and

one rule of damages applied when a case is tried in the Federal Courts in Texas and a different rule applied when the case is tried in a State Court.

Therefore, this Court should grant this writ to pass upon the questions of wide import under the Constitution and for the purpose of exercising its supervisory powers over the matter of practice in the lower federal courts. While of importance to the parties, this case has an immediate importance to the Bench and Bar far beyond the particular facts and parties involved.

Respectfully submitted,

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APPENDIX "A"

Constitution of the United States, Amendment No. 7:

"In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Judicial Code, Sec. 879 (RS, sec. 1011):

"There shall be no reversal in the Supreme Court or in a Circuit Court of Appeals upon a writ of error for error in ruling any plea and abatement, other than a plea to the jurisdiction of the court, or for any error in fact." (RS, sec. 1011, Acts. Sept. 24, 1789, c. 20, sec. 22, 1 Stat. 84; Mar. 2, 1803, c. 40, sec. 2, 2 Stat. 244; Feb. 18, 1875, c. 20, 18 Stat. 318).

28 USC, Sec. 1291, 28 USCA, Sec. 1291:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 USC, Sec. 2105, 28 USCA, Sec. 2105:

"There shall be no reversal in the Supreme Court or a Court of Appeals for error in ruling upon matters and abatement which do not involve jurisdiction."

28 USC, Sec. 2106, 28 USCA, Sec. 2106:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of the court lawfully brought before it for review, and may remand the case and direct entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances."

APPENDIX "B"

In the memorandum sent to us from the Circuit Court of Appeals, the question was asked:

> "Should this court grant more than the state court would allow under the same circumstances? This is the question presented by the Erie Railroad case, as construed by the York case."

Then the memorandum continued:

> "The rule has been repeatedly announced that the Seventh Amendment forbids the federal appellate courts to reverse because of excessive damages, but it is also suggested that this amendment deals with substance and not with form; that its purpose was to preserve the essentials of the jury trial, 'not to perpetuate the minutiae of trial practice as it existed in the English Courts in 1791.' Mr. Justice Stone, dissenting in Dimick v. Schiedt, 293 U. S. 474, 490, L. Ed. 296, said: 'From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see Parsons v. Bedford, 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit.'
>
> "If the court is convinced that the Texas law would require a Texas court to order a remittitur in this case, upon pain of reversal, is the federal court bound by the same law, since is jurisdiction rests solely upon diversity of citizenship, and Erie Railroad v. Tomkins, 304 U. S. 64, as construed, requires that for the same transaction the same result in litigation should be reached without regard to whether the suit be brought in a state or federal court? See Guaranty Trust Co. v. York, 326 U. S. 99.
>
> "The court also wants to call your attention to the fact that there is no statutory provision that restricts the scope of appellate review, and the new Judicial Code, which became effective September 1, 1948, has

greatly widened such scope, and repealed a restrictive provision that has been in the federal statutes since the Judiciary Act of 1789. See Section 2106 of said Code, 28 USC 2106. See also section 2105 of said Code, which limits the scope of review upon rulings in abatement to matters involving jurisdiction, but which repealed that part of Section 1011 of the Revised Statutes which provided that there should be no reversal in the Supreme Court or in a circuit court for any error in fact. This was 28 USCA 879 of the old Judicial Code and Section 1409 of Barnes' Federal Code of 1919. This provision has been in the statutes since Sept. 24, 1789, and had survived through the various Acts until Sept. 1, 1948; but now it has been repealed. It is gone, like the federal statute of jeofails, and a number of other procedural statutes, which have been repealed, or superseded by provisions in the new Code or by the Federal Rules of Civil Procedure. By said Section 2106 of the new Code, New Title 28 USC, the Congress has given to the federal appellate courts more extensive powers to review cases brought before them than it has ever before conferred upon them under Article III of the Constitution. Does this leave the Seventh Amendment as the only inhibition upon federal appellate judicial powers applicable to questions of remittitur? See also Galloway v. United States, 319 US at page 390, which, speaking of the Seventh Amendment, said:

> 'The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor where 'the rules of the common law' then prevalent, including those relating to the procedure by which the judge regulated the jury's role on question of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process

already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.

'This difficulty, no doubt, accounts for the amorphous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.'

"The statute that was modified, which modification the court thinks is to important, reads as follows:

'There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. (R.S., Sec. 1011; Acts Sept. 24, 1789, c. 20, Sec. 22, 1 Stat. 84; March 2, 1803, c. 40, sec. 2, 2 Stat. 244; Feb. 18, 1875, c. 80, 18 Stat. 318.)'

"It has been suggested that the elimination of those six words, *'or for any error in fact,'* remove all statutory inhibitions on the granting of remittur by federal appellate courts except the Seventh Amendment. It has also been suggested that in many old cases, where the judges have stated that they had no power or jurisdiction to reverse for excessive verdicts or for

the failure of the court below to grant new trials, they had in mind those six words and not the Seventh Amendment, and that later cases by judges who had overlooked this statute attributed the lack of power in appellate courts to the Seventh Amendment rather than to the statute."

The memorandum attached to the letter was as follows:

"The English cases and text materials, with but two exceptions, are not directed to a consideration of remittitur as we know it in this country; instead they are concerned with the issue of whether or not a new trial may be ordered for excessive damages. That issue has been settled in England in favor of the power. Praed v. Graham (1889), 24 QBD 53; 26 Halsbury's Laws of England, p. 124. Such material is entirely relevant to a consideration of the constitutional question here presented. The two issues seem to be different aspects of the same problem. Also, it is worthy of note that cases involving the principles of remittitur often discuss cases involving the motion for a new trial. For example, Beardmore v. Carrington (1764), 2 Wils 244, 95 Eng. Rep. 790 K-B, presented the issue of whether or not granting the motion for a new trial on the ground of excessive damages would be a violation of the Constitution (Eng.), and Beardmore v. Carrington is quoted at length in the Supreme Court's decision in Dimick v. Schiedt, 293 US 474, which involved additur. We shall list the various methods that were available at common law for questioning judicial proceedings, as follows:

"After the writ of attaint fell into disuse, they were: (1) writ of error; (2) coram nobis (at King's Bench) for default of a clerk or errors as to matters of fact; (3) audits querells for relief because of good matter of discharge occurring after judgment rendered; and (4) most important, the motion for a new trial, which was presented to the court en banc, not to the trial court. Holdsworth's History of the English Law, Vol. 1, p. 225; Footnote 9, Fairmount Glass v. Coal Co., 287

US 474, 482. This was true whether the trial was held at nisi prius or at bar. Bright v. Eynon (1757), 1 Burr. 390, 395; 26 Yale L. J. 49, 57; 3 Bl. Comm. Ch. XXIV (388, 392). The most material distinction between the venire facias de novo and the motion for a new trial was that the former was granted upon matter appearing of record, but a new trial might be granted upon things outside the record. Witham v. Lewis (1774), 1 Wils 48-55 (KB). In Bright v. Eynon (1757), 1 Burr. 390 (KB), Lord Mansfield attributes the paucity of authority to the fact that the old report books did not give any account of the determination made by the court upon motions. Chitty, in his work on Blackstone (Vol. 3, p. 306) footnotes Blackstone's statement with 'for excessive damages indicating passion or prejudice.' Chitty's statement is supported by Beardmore v. Carrington, but it does not appear that Blackstone so interpreted the case of Wood v. Gunston, 3 Bl. Comm. 388, nor did Lord Mansfield.

"Bright v. Eynon (1757), 1 Burr. 390 (KB) seems to us to be the most valuable case decided about this time, because in that case Lord Chief Justice Mansfield succinctly states the philosophy of the period. He said that it was absolutely necessary to justice that there should, upon many occasions, be opportunities to reconsider the cause by a new trial; that for a good while after this time the granting of new trials was holden to a degree of strictness so intolerable that it drove the parties into a court of equity; and that, therefore, of late years the courts of law had become more liberal in the granting of new trials, according to the circumstances of the respective cases. The rule laid down by Lord Parker, in the case of The Queen v. The Corporation of Helston, H. 12 Ann. B. R. seems to be the best general rule that can be laid down upon this subject, viz., 'doing justice to the party,' or, in other words, 'attaining the justice of the case.' In 1758, the court reaffirmed its power to grant new trials because of excessiveness of damages, but did not find the damages to be excessive, in the case of Redshaw v.

Brook, 95 Eng. Rep. 887 and Wilford v. Berkley (1758) 2 Wils 405. To the same effect is Bruce v. Rawlins (1770), 3 Wils 62, 95 Eng. Rep. 934. In view of this, it is surprising to find a court in 1764 denying the authority. In Beardmore v. Carrington (1764), 2 Wils 244, on a motion to set aside the verdict because of excessive damages and award a new trial, the court said:

> "'. . . as to the case of writ of inquiry in the Year Book of H. 4, we doubt whether what is said by the Court in that case be right, that they would abridge the damages unless the plaintiff released part thereof, because there is not one case to be found in the Year Books wherever the Court abridged the damages after a principal verdict. . . . We are now come to the case in 1 Strange 691, Chambers v. Robinson, which seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only . . .'

"The court goes on to say that it 'would be digging up the Constitution by the roots,' but quickly adds:

> "'We desire to be understood that this court does not say, or lay down any rule that there never can happen a case of such excessive damages in tort where the Court may not grant a new trial; but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against at first blush.'

"The decision was rendered Per Curiam, and we are unable to determine which court rendered the decision. During this period of time, Burrow was reporting in Kings Bench; but this case is reported in Wilson, who stated that the volume contained cases in the Court of Common Pleas, etc.

"In 1776, Lord Mansfield is reported as having said that he had no doubt but that it might be right to give an opportunity of reconsidering a verdict where excessive damages had been given, but that the present

case did not dissatisfy him. Benson v. Frederick (1766), 3 Burr. 1845 (KB). Mr. Justice Ashton concurred. The reporter says that he was full in vindicating the discretion of the court to grant new trials even when the damages were ideal, and cited Woods v. Gunston, supra. By ideal is meant those damages not capable of exact ascertainment, but which are a matter of speculation. Beardmore v. Carrington, supra.

"Turning now to an examination of Supreme Court decisions: Parsons v. Bedford, 28 US 433, and Kennon v. Gilmer, 131 US 22, are usually cited for the propositions that appellate review of a motion for a new trial and an appellate court's ordering remittitur in a tort case are violations of the Seventh Amendment to the Constitution. Parsons v. Bedford was decided by Mr. Justice Story, who is generally credited with introducing remittitur into this country in the case of Blunt v. Yount, 3 Mason 102. In the Parsons case, the court did not have before it a situation where an appellate court had reviewed a trial court's decision in granting or denying a motion for a new trial. As for Kennon v. Gilmer, remittitur was ordered by the Supreme Court of the Territory of Montana, but it was not made conditional; the order was absolute in form, a procedure which would be questionable on constitutional grounds if applied by a district court today. It is difficult to understand the final disposition of the case except on the basis that it implies the constitutionality of appellate exercise of remittitur. The Supreme Court said:

> "'. . . the erroneous judgment of the Supreme Court of the Territory being reversed the case will stand as if no judgment had been entered; and that court will be at liberty in disposing of the motion for a new trial according to its view of the evidence, either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditioned upon a remittitur by the plaintiff.'

"Kennon v. Gilmer came before the Supreme Court of the Territory of Montana on appeal from the trial court, and the organized territory was subject to the Constitution of the United States. Perhaps a statute gave the territorial supreme court jurisdiction to entertain the motion for a new trial but, if so, it must be presumed that the law was held constitutional. Therefore, if the Supreme Court of the Territory constitutionally could order a remittitur on motion for a new trial made to it, then it would seem that a Court of Appeals would not be violating the Constitution in so doing, in other words, there may be a statutory problem or a procedural problem, but the case tends to indicate that there is no constitutional difficulty. See Judge Learned Hand's opinion in Maryland Casualty Co. v. Miller, 40 F. (2) 463, at 465, where he says that the Seventh Amendment is no bar to appellate review but that only a procedural difficulty is presented. Cf. his opinion in Harrison v. US., 7 F. (2) 262, and see comment in Fairmount Glass v. Coal Co., 287 US 474, 482,"

APPENDIX "C"

HUTCHESON, Chief Judge:

For a statement of the issues and pertinent facts in this case, we refer to the opinion of the trial court, which is reported in 88 Fed. Supp. 54. We agree with the lower court's holding: that, if Sunray retained control over the premises and the derrick, it was bound to exercise reasonable care to maintain the derrick in safe condition for use; and that there was substantial evidence to support its finding that Sunray did retain such control. We agree, too, with its holding: that there was substantial evidence to support the jury's findings, that Sunray failed to exercise such care and that such failure was the proximate cause of the collapse of the derrick and the injuries sustained by the appellee.

The crucial question as to liability on this appeal is

whether the appellant retained control of the derrick at the time of its fall. Neither side requested an instruction to the jury for a special verdict on this particular point; the court gave none; and the jury made no finding thereon. There was a finding by the jury that the derrick was defective immediately prior to its collapse, and that its defective condition could have been discovered by appellant by the exercise of ordinary care, which it failed to do, and which failure was a proximate cause of the derrick's falling. There were also findings that, at the time of the collapse and immediately prior thereto, the contractor had, and the contractee did not have, control over the means and manner of performance of the work which was required of appellee.

The court below rejected appellant's contention that the jury's finding as to who had control over the means and manner of performing the work prevented it from being liable on the theory that it retained control of the derrick. The court held that such finding had reference only to the dispute as to whether Allbritton was employed by the appellant or the contractor; and the jury found that he was not employed by appellant. No special finding by the jury having been made or requested on the particular issue as to control of the derrick, the trial judge was empowered to make it under Rule 49(a) of the Federal Rules of Civil Procedure. By failing to request such finding by the jury, each party waived the right to a trial thereof by jury. On this point, said Rule 49(a) further provides as follows: "As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

It is contended by the appellee that he was a business invitee under the derrick and on the premises of appellant; the latter admitted in its responsive pleading that appellee "was either an employee or an invitee of the defendant as alleged by plaintiff." It is obvious from this that admittedly Allbritton was either an employee or invitee of the appellant. The jury found that he was not an employee; the trial court found or is deemed to

have found that he was an invitee. Allbritton was not required to work on the derrick; he himself did not use it; and his work in no way affected it. He was required to handle only tools as distinguished from machinery. At no time did he go upon the derrick, though he was required to be at a point which put him in danger of being hit by it if it fell. Other independent contractors were performing work for Sunray under the derrick at the time it fell, and the latter's superintendent at the time was supervising the whole operation. The trial court's finding, that Sunray had not surrendered control of the derrick to appellee's employer, is supported by substantial evidence and should not be set aside as clearly erroneous. It appearing from the working arrangement that the derrick remained under the control of appellant, and the appellee being an invitee as aforesaid, it follows that appellant was under the legal duty to exercise ordinary care to keep the premises, including the derrick, in a reasonable safe condition for appellee's use.

Finding no reversible error in the record, we, therefore, affirm the judgment, except as to the recovery of $13,084.70, which had been paid to Allbritton by the workmen's compensation insurance carrier, and which Allbritton had sought to recover on its behalf. Though it was the real party in interest, with the right to sue therefor, it was not a party to this suit, having failed and refused to prosecute it against appellant. Instead, it sought to recover without suing by agreeing with appellee that, if he would bring the suit, he could recover, and hold for it, all sums that it was entitled to recover against defendant by virtue of its subrogation rights under the laws of Texas. Appellee accordingly prayed that he recover and hold said sums as trustee, but this he could not do. He was not the trustee of an express trust in the sense of Rule 17(a), which provides that every action shall be brought in the name of the real party in interest but that the trustee of an express trust may sue in his own name without joining with him the party for whose benefit the action is brought. Moreover, it is not settled by the Texas law that the employee's

right to recover against third persons is limited to damages in excess of the compensation paid to him.[5]

The judgment is, therefore, reformed by reducing it by the sum of $13,084.70, and, as reformed, is affirmed.

Reformed and affirmed.

HOLMES, Circuit Judge, Dissenting.

McCORD, Circuit Judge, Dissenting.

HOLMES, Circuit Judge, Dissenting.

The moderated verdict is manifestly excessive, in my opinion, and the judgment entered thereon should not be affirmed unless the excessive portion be fully remitted by the appellee. Heretofore it has been well settled in federal jurisprudence that general excessiveness in verdicts in actions for personal torts was a question for the trial courts, and that appellate courts lacked jurisdiction in such matters.[6] The earliest of these cases, and the prototype of them all, is *Parsons* v. *Bedford*, 3 Pet. 433, 7 L. Ed. 732, wherein the appellant complained of the trial court's refusal to order the clerk to record the testimony, which might have established an error of the jury upon an issue

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[5] Texas Employers Ins. Assn. v. Brandon, 126 Tex. 636, 89 SW 982; Wm. Cameron & Co. v. Gamble, 216 SW 459; Hanson v. Ponder, 300 SW 35, 40; Mitchell v. Dillingham, 22 SW (2) 971, 972; Peddigo & Peddigo v. Groom, 37 SW (2) 1074, 1076; Hoffman v. Houston Clinic, 41 SW (2) 134, 138; Hartford Accident & Indemnity Co. v. Week's Drug Store, 161 SW (2) 153, 155; Traders & General Ins. Co. v. West Texas Utilities Co., 165 SW (2) 713, 715. See also Art. 8307, R. C. S. of Texas, 1925. Cf. Jordan v. Collier, 223 SW (2) 548.

[6] Minor v. Tillotson, 2 How. (15 U.S.) 149; Suydam v. Williamson, 20 How. 427; Railroad Co. v. Fraloff, 100 U.S. 24; Wabash Railway Co. v. McDaniels, 107 U.S. 454; Kennon v. Gilmer, 131 U.S. 22; Wilson v. Everett, 139 U.S. 616; New York, Lake Erie & Western R. Co. v. Winter's Administrator, 143 U.S. 60; Lincoln v. Power, 151 U. S. 436; Hansen v. Boyd, 161 U. S. 397; Van Bosker v. Torbert, 184 Fed. 419; Miller v. Maryland Casualty Co., 40 F. (2) 463, 464, Note 1; Smith v. Socony Vacuum Oil Co., 96 F. (2) 98; Brabham v. State, 96 F. (2) 210; Swift & Co. v. Ellinor, 101 F. (2) 131; Home Ins. Co. v. Tydal Co., 152 F. (2) 309, 157 F. (2) 851; Reid v. Nelson, 154 F. (2) 724; Virginian Ry. Co. v. Armentrout, 166 F. (2) 400; Crowell-Collier Pub. Co. v. Caldwell, 170 F. (2) 941; Dowell v. Jowers, 182 F. (2) 576.

of fact. The Supreme Court held the assignment immaterial for the reason that the Seventh Amendment prohibited its re-examination of such matters where the issues were tried by a jury. The decision of this constitutional question was not necessary to the disposition of the case, because under section 22 of the Judiciary Act of 1789, no reversal upon writ of error was permissible in the Supreme Court for any error of fact. 1 Stat. 84, Chap. 20, Sec. 22; 2 Stat. Chap. 40, Sec. 2, p. 244; 18 Stat., Chap. 80, Sec. 1; R. S., Sec. 1011; 36 Stat., Chap. 231, Sec. 291, p. 1167; 28 U. S. C. (1940 Ed.), Sec. 879 and 880.

When writs of error were abolished and appeals substituted therefor, it was expressly provided that appeals from the district courts should be subject to the same rules, regulations, and *restrictions*, as were previously prescribed in law in cases of writs of error. Title 28 U. S. C. (1940 Ed.) 880. The Judiciary Act of September 24, 1789, was adopted nearly fifteen months before the Seventh Amendment became effective. The language of the statute forbidding reversals upon writs of error for any error in fact was without limitation or qualification, whereas the applicable language of the Seventh Amendment prohibits re-examination of any fact tried by a jury only otherwise "than according to the rules of the common law."

This statutory limitation on the power of federal appellate courts, except as modified by Rule 52, remained in effect until September 1, 1948, when it was repealed by the new Judicial Code. The reason for its repeal is immaterial, because the evident fact is that there was no intention on the part of Congress or the Revisors of the code to extend the scope of appellate judicial review beyond the limits prescribed by the Seventh Amendment. Consequently, it is plain that this Amendment is the only barrier to the present power of appellate federal courts, in cases of excessive verdicts, to call upon the plaintiff to enter a remittitur or suffer a reversal of the judgment; and whether it is any such barrier depends upon the rules of the common law on December 15, 1791. Therefore, a re-examination of the foundation upon which rests the classic dictum in *Parsons* v. *Bedford* is now appropriate.

That the trial court has jurisdiction to call on the plaintiff for a remittitur, without curtailing the function of the jury, is conceded in both the majority and dissenting opinions in *Dimick* v. *Schiedt*, 293 U. S. 474. See also the scholarly opinions in *Slocum* v. *N. Y. Life Ins. Co.*, 228 U. S. 365. Why, then, may not an appellate federal court exercise the same power when the amount of the verdict is clearly excessive? The advantages of such procedure are generally recognized (*Northern Pacific RR Co.* v. *Herbert*, 116 U. S. 646-7; *Arkansas Cattle Co.* v. *Mann*, 130 U. S. 74); the defendant is not prejudicially affected by a reduction of the amount adjudged against him; the plaintiff is merely given the option to have a new trial or to accept the maximum recovery that the court has determined may be allowed; and in either event no one will have been denied a trial by jury according to the rules of the Common law.

No greater champion of the common-law right of trial by jury ever lived than William Blackstone. He called the jury system the glory of the common law, but thought it could not survive unless the misbehavior of jurors was subject to moderation by the judges. Blackstone's Commentaries had a wide circulation in America at the time of the Constitutional Convention. It is said that sixteen signers of the Declaration of Independence knew the book from cover to cover. A source book of legal science, a landmark in law and literature, it is safe to say that its contents were familiar to every American lawyer in public life in 1789 to 1791. There have been 73 editions of it in English, 56 in French, 11 in German, 9 in Italian, and one in almost every other language, including the Chinese.[1] According to these Commentaries, the Court of King's Bench had appellate jurisdiction over the Court of Common Pleas and all inferior courts of record. Blackstone cites authorities upon which, he says, Chief Justice Glynn, in 1665, grounded the first precedent for granting a new trial upon account of excessive damages given by the jury; "apprehending, with reason, that notorious partiality in the jurors was a principle species of misbehavior." Book III, pp. 388, 389, 390.

[1] See cover page of modernized edition of Blackstone's Commentaries by Dean Bernard C. Gavit, Indiana University School of Law.

Coke said that the King's Bench had jurisdiction to correct all manner of errors in fact and in law of all the judges and justices of the realm.[8] In 1786, in King's Bench, Lord Mansfield said there was no doubt but that the court had the power to take the opinion of a second jury where the damages were excessive.[9]

If every verdict were final in the first instance, said the great Commentator, it would tend to destroy the valuable method of trial by jury, and would drive away from the common-law courts all causes of consequence to be decided upon depositions. "The jury" he said, "are to give their opinion instanter; that is, before they separate, eat, or drink. And under these circumstances the most intelligent and best-intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse." In a note, he cites Bracton to the effect that if the jury shall have erred, and the justices have pronounced judgment according to their verdict, they pronounce a false judgment; and therefore ought not to follow up the verdict but should amend it by a careful examination, but if they cannot decide it, it shall be referred to a higher tribunal.[10] At that time, the motion for a new trial preceded the entry of judgment, which was not entered upon the verdict as a matter of course, nor at all until after the first four days of the next term after trial; and the judges did not think themselves warranted to pronounce a false judgment. Not only did the court of original jurisdiction have power to order a conditional remittitur, and were under a duty to amend an excessive verdict, but if they failed to do this, "or could not decide it," as Bracton said, "it was referred to a higher tribunal." Bracton's treatise, compiled between 1250 and 1256, is regarded as incomparably the best work of its kind produced by any English lawyer in the middle ages.

Blackstone read the opening of his Vinerian Lectures on

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[8] Holdsworth's History of the Common Law, Vol. 1, p. 212.

[9] Ducker v. Wood, 1 Term Reports, 277.

[10] Si Juratores erraverint, et justiciarii secundum eorum dictum judicium pronuntiaverint, falsam, faciunt pronuntiationem; et ideo sequi non debent eorum dictum, sed illud emendare tenetur per diligentem examination-em. Si autem dijudicare, nesciant, recurrendum erit ad majus judicium. Lewis' Blackstone, page 1348.

October 25, 1758. He said that the King's Bench was a court, the jurisdiction of which was very high and transcendent; that it kept all inferior jurisdictions within the bounds of their authority, either by removing their proceedings to it or prohibiting their progress below; that it was likewise a court of appeal into which might be removed, by writ of error, all determinations of the Court of Common Pleas, and all other inferior courts of record in England; but that even this so high and honorable court was not the court of last resort, for its determinations might be removed by writ of error into the House of Lords or the Court of Exchequer Chamber, as the case might happen to be, according to the nature of the suit, though the Court of Exchequer and the Court of Common Pleas were inferior to the Court of King's Bench. The Court of Common Pleas was styled by Coke as the lock and key of the common law; yet a writ of error, in the nature of an appeal, lay from the Common Pleas to the King's Bench, the whole judicial authority of which was "said to be in the mouth of the judges." Gavit's Blackstone, p. 542. Blackstone quotes Bracton as fully expressing the dignity and power of the Court of King's Bench when he says that the justices of this court are chief, general, perpetual, and elder, accompanying the king, who are appointed to redress the injuries and correct the errors of all others. Book III, pp. 41-43; Lewis' Ed. of Blackstone, pp. 1054-1057.

Whether the King's Bench was exercising original or appellate jurisdiction was not distinguishable in its proceedings, except by the character of its judgments and the nature of the subject-matter before it. Thus the motion for a new trial was a remedy in the nature of an appeal from the verdict of the jury, which in its origin was a substitute for the writ of attaint, which in turn succeeded the right of appeal to trial by battle.[11] It was used at common law in

[11] There were four principal writs in the nature of appeals from proceedings in the King's court of law. There were writs of attaint, of deceit, of audita quarela, and of error. The writ of attaint was a very old remedy for reversal of a verdict unduly given. It was devised in lieu of the ferocious Norman remedy of trial by battle. As the writ of attaint succeeded the right of trial by battle, so the motion for a new trial was devised as one of several remedies by which an attaint might

courts of either original or appellate jurisdiction; on account of it, the writ of attaint was totally laid aside because experience proved that the motion for a new trial was the "shortest, cheapest and most effectual cure for all imperfections in the verdict." Book III, p. 393; Lewis' Blackstone, pp. 1350, 1351. Like the earlier inferior courts of the United States that exercised both original and appellate jurisdiction, the King's Bench was presided over by one or more judges, who sat together in courts that were mutually connected and "were interchangeably courts of appeal or advice to each other." III Blackstone 356; Gavit's Blackstone, p. 675; Lewis' Blackstone, p. 1317. Pre-eminently these courts resembled each other in that the old district courts of the United States which exercised circuit court jurisdiction did not distinguish in their proceedings whether they sat as a circuit or a district court. This was determined by the nature of the proceedings and the character of the judgments. *Southwich* v. *The Postmaster General,* 2 Pet. 442.

The contention that procedure by remittitur in federal appellate courts is inhibited by the Seventh Amendment is contrary to the teachings of Ashton, Bracton, Fleta, Glynn, Coke, Mansfield, and Blackstone, as to the rules of the common law of England; and in conflict with the opinions of Hughes, Holmes, Stone, Brandeis, Cardozo, and Rutledge, as to the scope and essential purposes of the Seventh Amendment. It is likewise in conflict with the opinion of the Supreme Court in *Galloway* v. *United States,* 319 U. S. 372, 390, with the spirit of Rule 50(b) of the Federal Rules of Civil Procedure; with decisions of the Sixth and Ninth Circuits; and with the actual decision of the Supreme Court in *Kennon* v. *Gilmer* 131 U. S. 22, the final disposition of

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be avoided. The motion struck at errors of fact not appearing of record, because the testimony of witnesses was submitted viva voce in the presence of the jury, and was not reduced to writing. The practice of setting aside verdicts upon motions so far superseded proceedings in attaint, that few instances of them appear later than the 16th century. In 1784, Reinsford, C. J., said: "Juries are wilful enough, and denying a new trial here will but send parties into Chancery." Martin's Civil [illegible], p. 388; Lewis' Blackstone, pp. 1348, 1363; Stephen on Pleading, pp. 95, 96; 5 Harvard Law Review, p. 386.

which it is impossible to reconcile with the Seventh Amendment except upon the basis that the decision implies the constitutionality of appellate exercise of the procedure by remittitur, it being expressly held therein that the Seventh Amendment was in full force in the Territory of Montana. In 26 Yale Law Journal, 49, the writer admits, p. 57, that Blackstone is quite accurate in saying "if any defect of justice happen at the trial by surprise, inadvertence, or misconduct, the party may have relief *in the court above* by obtaining a new trial." See also note 13, p. 57, of the same article; Vol. 1, p. 111, of Univ. of Chicago Law Review; 98 Penn. Law Review 575, 578.

An alternative to procedure by remittitur is to scan the record more closely for error, and reverse the judgment that but for the excessive verdict should be affirmed. In *Home Ins. Co.* v. *Tydal Co.*, 152 F. (2) 309, 311, this court said: "The trial judge alone has the right and duty to set aside the verdict if dissatisfied with it. The most an appellate court can do, if it thinks the verdict is not according to the weight of the evidence, is to scan the trial more closely for error." Thus, a fact tried by jury would be re-examined otherwise than according to the rules of the common law, which took a more direct and less specious approach to the problem. At common law, according to Bracton, Blackstone, Coke, and Mansfield, it was a question of the jury having abused their discretion in rendering a verdict for manifestly excessive damages often "without any bad motive at all; from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes." Always praising the common law, after quoting Bracton to the effect that the verdict should be amended if the jury have erred, or "the matter referred to a higher tribunal," Blackstone says: "And it is worthy of observation, how infinitely superior to all others the trial by jury approves itself, even in the very mode of its revision." Book III, Ch. 24; Lewis' Blackstone, pp. 1348-9. The procedure of referring the issue of excessive damages to a higher tribunal was one of the things that Blackstone said rendered perfect that most excellent method of decision "which was the glory of the

English law." Maugre this: shall we repudiate such "excellent method of decision," as violative of the common law of England in 1791? The effort of the common-law judges of the higher tribunal to ascertain the facts (the evidence of which was not, as now, preserved verbatim) is commendable. It was often disclosed to the court by affidavits or was taken from the "information" of the judge, "who usually made a special and minute report of the evidence." Now, with the facts before them, stenographically reported, the majority of appellate federal courts refuse to consider the excessiveness of verdicts if supported by any substantial evidence, and refuse to determine the maximum or minimum amount that will be permitted to stand; but, if they think the verdict is against the weight of the evidence, they may scan the record of the trial more closely for error, and probably send the case back for an arduous, expensive, and long-delayed new trial, when a remittitur of the excessive amount would be better for the plaintiff and without prejudice to the defendant.

In *Miller* v. *Maryland Casualty Co.*, 40 F. (2) 463, decided in 1930, the Second Circuit refused to follow the Lepisto case, 6 F. (2) 128, but thought it might be desirable to give appellate courts the power to review the damages, and that only a procedural difficulty was presented, the Seventh Amendment being no bar, closing with this statement: "Until the practice is frankly changed, we must adhere to it as it exists." The court questioned the practice that it was bound to decide the issue by such "tenuous unrealities," as whether the trial judge was acting within the bounds of "tolerable conclusion" in determining that the jury was within the bounds of "reasonable inference from the evidence," when it assessed the damages at the amount stated in the verdict. Courts should not engage in such scholastic refinements, said Judge Learned Hand.

At common law, in re-examining the issue of damages that had been tried by a jury, the higher court (to which Bracton and Blackstone referred) was re-examining a question of fact; it was looking to the verdict that the jury had rendered and to the facts upon which the verdict was based. It was a question of the manifest excessiveness of the verdict, and this issue was re-examined before the

judgment was entered. One office or function of the motion for a new trial was an appeal from the verdict upon an alleged error of fact by the jury.[12] If the verdict was sustained, judgment thereon was entered; if the verdict was found to be manifestly excessive, it was moderated by the justices or a new trial granted. The federal appellate practice of looking at the verdict through the eyes of the trial judge (evidently in an attempt to covert an issue of fact into a question of law) grew up on this country during the existence of a federal statute that prohibited any reversal on appeal for an error of fact. This is the simple truth that cannot be denied or explained away except by saying that this "higher court" was exercising original not appellate jurisdiction, and that is an explanation which cannot be supported by English authorities. Yet the common law alluded to the Seventh Amendment is the common law of England, and our federal decisions are not primary authorities as to the common law of England; but we do have a primary authority as to the meaning of the Seventh Amendment, when Mr. Justice Story, speaking for the court says: "Beyond all question the common law here alluded to is not the common law of any individual state, for it probably differs in all, but it is the common law of England, the grand reservoir of all our jurisprudence." *U. S.* v. *Wonson,* 1 Gall. 5, Fed. Cases No. 16,750. Then let us be direct, and take the English common-law approach to the problem, as required by the Seventh Amendment.

Why should we look to federal decisions to ascertain the rules of the common law when the unquestioned construction of the Seventh Amendment indicates the common law of England as the pattern that is to be copied? Why should we not follow the common-law method of moderating excessive verdict instead of devising a substitute therefor?[13] The substitute, however, is not unconstitutional,

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[12] Just as was the appeal to trial by battle or by writ of attaint, according to Bracton, Fleta, and Blackstone: 3 Blackstone 351, 393; Bracton, 1.4, tr. 1, c; Fleta 1.5, c. 22, Sec. 8.

[13] Dimick v. Schiedt, 293 U.S. 474, wherein Mr. Justice Stone, dissenting, said p. 488: "In denying the motion the trial judge relied on two rules of the common law which have received complete acceptance for centuries. One is that the court has power to act upon a motion to set

because it is not the minutiae but the substance of trial by jury that is preserved by the Seventh Amendment. A fortiori, the genuine procedure, exactly according to the rules of the common law, is not unconstitutional. Under the substitute, an appellate court has no power to review directly an error of fact committed by the jury in rendering a manifestly excessive verdict; but if the verdict is inordinate or monstruous (after scanning the record more closely for errors and not finding any), the appellate court may determine whether or not the trial court abused its discretion in not setting the verdict aside as manifestly excessive. *Detroit Transfer Co.* v. *Pratt*, 6 Cir., 2 F. (2) 193; *Carter Coal Co.* v. *Nelson*, 4 Cir., 91 F. (2) 651, 654; *Western Union Tel. Co.* v. *Dismang*, 10 Cir., 106 F. (2) 362, 364; *Southern Fruit* v. *Fulmer*, 4 Cir., 107 F. (2) 456, 459; *Virginian Ry. Co.* v. *Armentrout*, 4 Cir., 156 F. (2) 400, 409; *2 Am. Jur.* 907, 911. This judging by remote control, and at best is a circuitous, uncertain, and unsatisfactory method. A verdict that is manifestly excessive is inordinate; and may in some instances be termed monstrous.[14] Each of the three adjectives describes something unusual, abnormal, extraordinary. At common law the Court of King's Bench did not engage in any tenuous refinements as to the meaning of these words.

Next to doing right, says Blackstone (Lewis' Ed., p. 1349), the great object in the administration of public justice should be to give public satisfaction, and if the verdict be liable to many objections and doubts, no party

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aside the verdict of a jury because inadequate or excessive, and in its discretion to grant or deny a new trial. Railroad Co. v. Fraloff, 100 U.S. 24, 31; Wilson v. Everett, 139 U.S. 616, 621; Lincoln v. Power, 151 U.S. 436, 438. The other, which is implicit in the first, is that it has power to determine, as a matter of law, the upper and lower limits within which recovery by a plaintiff will be permitted, and the authority to set aside a verdict which is not within those limits. Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74; cf. Southern Ry. Co. v. Bennett, 233 U.S. 80, 87.

[14] EXCESSIVE and EXTRAORDINARY are given in the dictionaries as meaning the same as, and being synonymous with, MONSTRUOUS. See Webster's New International Dictionary, Funk & Wagnalls New Standard Dictionary, and Webster's Revised Unabridged Dictionary of the English Language.

would go away satisfied unless he had a prospect of reviewing it. "He would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress." From the Judiciary Act of 1789 down to this date, all federal courts (district, circuit, and supreme) have had the express statutory power to grant new trials, in cases where there had been a trial by jury, for reasons for which new trials had usually been granted in the courts of law.[15] How, then, can we say, if convinced that this verdict is manifestly excessive, that we have no power to suggest a remittitur? Procedure by remittitur is implied in the power to grant new trials, and it should not be confused with the civil law practice. Blackstone answered this argument nearly 200 years ago by pointing out the distinction between the civil and the common law procedures. With us, he said, no new trial is allowed unless there be a manifest mistake, and the subject-matter be worthy of interposition, whereas by the civil law process the parties are at liberty to appeal from court to court upon questions merely of fact, "which is a perpetual source of obstinace chicane, delay, and expensive litigation." Lewis' Ed., p. 1350.

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[15] Sec. 17, Judicial Act of 1789; Sec. 726 of Revised Statutes of the United States; Sec. 269 of the Judicial Code of 1911; Sec. 391 of Title 28, Code of 1940; Sec. 2106 of Code 1948. In an excellent article by Roscoe Pound, in 1910, much of which has found its way into our present Federal Rules of Civil Procedure, it is said: "Upon any appeal, in any sort of cause, the court should have full power to make whatever order the whole case and complete justice in accord with substantive law may require, without remand, unless a new trial becomes necessary." The principles of this suggestion are now fully contained in Section 2106 of the Judicial Code of 1948.

The following quotation from said article is also very pertinent here: "At common law, after trial at nisi prius, the cause was heard by the court in banc upon rule for a new trial or motion in arrest or for judgment non obstante. In that simple proceeding and not in the writ of error, an independent proceeding of a formal and technical character, is the true analogy for appellate procedure. Unhappily, the other has been followed." Vol. 71 of The Central Law Journal, p. 228. This failure to follow the simple procedure of the common law in treating the motion for a new trial as an independent proceeding of an appellate nature may be called the greatest procedural error in the judicial history of the United States.

Finally, so far as appears, neither the question of excessive damages nor the question of appellate procedure by remittitur was considered by the court in *Parsons* v. *Bedford,* supra. On the merits the court held that, even if all the evidence on which the jury passed had been in the record, it could not examine the correctness of the verdict; yet in *Parsons* v. *Armor,* 3 Pet. 413, where a jury was waived, the court treated the evidence as a bill of exceptions and "giving the utmost force to the testimony in favor of Armor" was of the opinion that the judgment must be reversed. It is not perceived why the same result should not have been reached, as a matter of law, if all the evidence had been in the record in *Parsons* v. *Bedford,* 3 Pet. 433, and the court had given "the utmost force" to the proffered testimony in favor of Bedford. The latter case, due to its high source, is entitled to careful study and analysis, but it should not be followed on the scope and effect of the Seventh Amendment. It was written more than forty years after that amendment was submitted for adoption, and we have the same books and same source material from which to determine the common law of England as were available to the Supreme Court in 1830.[16] We should not close our minds to this great constitutional question.

McCord, Circuit Judge, concurs in this dissent.

Strum, Circuit Judge, took no part in this decision.

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[16] "The Seventh Amendment does not provide that facts tried by a jury shall not be re-examined, but that they shall not be re-examined otherwise than according to the rules of the common law. . . . It is only where the appellate court may reverse on the facts and then proceed to a final determination of the case that trial by jury has been destroyed." Article by William Wirt Blume, entitled Review of Facts in Jury Cases—The Seventh Amendment, October, 1936, Journal of American Judicature Society, Vol. 20, p. 130.

APPENDIX "D"

Before HUTCHESON, Chief Judge, and HOLMES, McCORD, BORAH and RUSSELL, Circuit Judges

PER CURIAM: It is ordered that the petition for rehearing in the above entitled and numbered cause be, and it is hereby denied.

HOLMES and McCORD, Circuit Judges, Dissenting.

HUTCHESON, Chief Judge, Concurring:

While I concur fully in the order overruling the motion for rehearing, in view of the statement in appellant's motion that the failure of the Court to state its views on the issue of the claimed excessiveness of the verdict has left them in doubt as to their proper course, I have concluded to briefly state my own views.

1. The action of the district judge in refusing to relieve against the verdict as excessive is, unreviewable by this court if the verdict is excessive only in fact, reviewable if it is excessive in law.

2. Whether, in the opinion of the district judge, a verdict is excessive as matter of fact, that is, though not contrary to right reason and, therefore, not excessive as matter of law, it is larger in amount than the judge thinks it justly ought to be, or is excessive as matter of law, that is, is so monstrous[17] or inordinate[18] in amount as to find no support in right reason[19] he has the same power, the same duty, in the one case as in the other to relieve against the excessiveness by granting a new trial or requiring a remittitur in lieu.

3. The power and duty, on the other hand, of the court of Appeals to relieve against excessiveness in verdicts

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[17] Virginia Railway Co. v. Armentrout, 166 F. (2) 400; Affolder v. N. Y., 339 U. S. 96; Barry v. Edmunds, 116 U. S. 550; So. Pac. v. Guthrie, 180 F. (2) 295; on rehearing 186 F. (2) 926; But see, contra, St. Louis, S.W. Ry. Co. v. Ferguson, 182 F. (2) 949.

[18] Crowell-Collier v. Caldwell, 170 F. (2) 941.

[19] Law and Fact in Insurance Cases, Texas Law Review, Dec. 1944, at pp. 4, 5, and 6; Reid v. Maryland Cas. Co., 63 F. (2) 10; Quanah v. Gray, 63 F. (2) 410; Howard v. L. A., 49 F. (2) 571; Chamberlayne, "The Modern Law of Evidence," Secs. 120(a), 122, 145, 148 and 149.

does not extend to cases where the verdict is excessive merely as matter of fact. Limited as it is by the Seventh Amendment, its power and duty extend only to cases in which the verdict is excessive as matter of law, that is, is so gross or inordinate in amount as to be contrary to right reason.

In such cases the Court of Appeals has the power, and it is its duty, to relieve against excessiveness in law either by reversing the judgment for the error in law of the trial judge in abusing his discretion by not relieving against it, or by requiring a remittitur in lieu of reversal.

In this case I was, and am, of the clear opinion that the verdict is not gross, monstrous, or inordinate, and, therefore, contrary to right reason, and if it is excessive it is not so as matter of law but only as matter of fact. This being so, I was, and am, of the opinion that this court is without power, it has no duty or function to inquire into the amount of its excessiveness as matter of fact, none to reverse for, or otherwise relieve against, the excessiveness, if any, as matter of fact, in the verdict.

In agreeing, therefore, to affirm the judgment against the attack upon it of the excessiveness of the verdict, I did so without at all intending either to approve or disapprove the amount of the verdict or to consider or determine whether it was or was not excessive as matter of fact or whether it should or should not have been relieved against by the district judge in the exercise of his undoubted power and his equally undoubted duty[20] to relieve against such excessiveness, if, in his judgment, it was excessive in fact, that is, was larger in amount than he thought it just ought to be.

HOLMES, Circuit Judge, dissenting:

The majority opinion did not discuss the constitutional question in this case, or the factual issue as to the amount of the verdict being manifestly excessive; but often what a court does is more important than what it says. Sometimes what the courts do speak so loudly that we cannot

[20] Cobb v. Lepisto, 6 F. (2) 128; Virginia Ry. Co. v. Armentrout, 166 F. (2) 408; Southern Pacific v. Guthrie, 186 F. (2) at 933 and note 11; Reid v. Maryland Cas. Co., 63 F. (2) at p. 12.

hear what they say, but that is not what happened here. Obviously, this court determined either that the moderated verdict was not manifestly excessive or that it had no constitutional power to examine the question. Either holding was prejudicially erroneous, the latter for reasons already fully discussed in the dissent, the former for reasons presently to be stated.

The court expressly held that the verdict for $125,000 was infected with error, and lopped therefrom the sum of $13,084.70 without calling on the appellee for a remittitur of that amount. This reduced the verdict and judgment to $111,915.30, which the court let stand. This judicial action necessarily implied a determination that the reduced amount was not manifestly excessive or that, as an appellate federal court, it had no constitutional authority to disturb the modified verdict or to call upon the appellee to remit the excessive portion thereof.

It is generally conceded, though with some play upon words, that federal appellate courts have the power to reexamine any fact tried by jury, for the purpose of ascertaining whether the trial court abused its discretion in denying a new trial. In *Crowell-Collier Pub. Co.* v. *Caldwell*, 170 F. (2) 941, this court said, p. 944:

> "If the verdict in this case were merely excessive in respect both of actual and punitive damages and in respect of the relation between the two, these facts standing alone would not constitute reversible error. But the verdict here was not merely in the ordinary sense an excessive verdict. It was an inordinate one, without precedent or sound legal basis."

In the recent case of *Commercial Credit Co.* v. *Pepper*, ——F. (2)——, which was tried by a jury but did not involve excessive damages, this court asserted its jurisdiction to review the trial court's ruling upon the motion for a new trial, and reversed the judgment of the district court on the ground that it had abused its discretion in refusing to grant a new trial. The court said:

> "Under the circumstances presented, and quite independent of the error in the charge, we are of

opinion that the trial court erred in denying plaintiff's motion for a new trial. It is a principle well recognized in the federal courts that the granting or refusing of a new trial is a matter resting within the discretion of the trial court. The term 'discretion', however, when invoked as a guide to judicial action, means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result. Quite to the contrary, it is definitely recognized in numerous decisions that an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error." Citing Langnes v. Green, 282 U.S. 531, and Virginia Ry. Co. v. Armentrout (4th Cir.), 166 F. (2) 400.

In the Virginian Railway case, 166 F. (2), the court said, at pp. 407-409:

> "The problem of assessing damages in a case of this sort is one which must be approached with common sense. . . . The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right.—The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear.—That abuse of discretion in refusing to set aside a verdict is an exception to the rule that the granting or refusing of a new trial is not assignable as error, is definitely recognized in the following decisions: (citing them)."

Thus it is apparent that any fact tried by a jury may be re-examined by an appellate federal court for the purpose of ascertaining whether the trial court abused its discretion in refusing to grant a new trial because the jury had abused their discretion in rendering a verdict for manifestly ex-

cessive damages, It is also apparent that at common law there was no such circuity of judicial review of a fact tried by jury when they had abused their discretion in rendering a manifestly excessive verdict. The King's Bench, in the exertion of its superintendent powers, re-examined the facts to determine whether the jury had been guilty of an abuse of discretion, apprehending with reason that rendering a verdict for manifestly excessive damages was a principal species of misbehavior by jurors. *Lewis'* Blackstone, p. 1347 et seq. By *Sec. 22 of the Judiciary Act of 1789,* federal appellate courts were forbidden to do this; but by Sec. 2106 of the Judiciary Code of 1948 they were required to do it, since the 7th Amendment impliedly authorizes the re-examination of any fact tried by a jury except otherwise than in accordance with the rules of the common law. The procedure of striking at the jurors' misbehavior over the shoulders of the trial judge was devised to prevent injustice because of the statutory restriction on appellate power. The old statute having been superseded, the reason for the device has ceased.

In the instant case, the majority may have deemed the moderated verdict manifestly excessive but not to such a degree as to evince bias, prejudice, or passion, on the part of the jury. If so, it was prejudicial error for the court to affirm the judgment unless the appellee remitted the excessive portion thereof. It is also true that the majority may have deemed the moderated verdict manifestly excessive but not to such a degree as to show an abuse of discretion on the part of the trial judge in refusing a new trial unless the plaintiff remitted the excessive portion. Upon the first hypothesis, the court was trying the jury, upon the second, it was trying the district judge, when it should have re-examined the facts tried by the jury, because such a re-examination would not have been "otherwise" than according to the rules of the common law.

In reducing the verdict by $13,084.70, this court did not eliminate that sum from the total amount of pecuniary damages sustained by the plaintiff, since under the law of Texas he was entitled to recover in this action only

the amount due him in excess of the sum paid him by the insurance carrier. Clearly, it was within the power of this court to determine the upper limit of the permissible verdict under the evidence. This necessitated a determination of the maximum amount that the most favorable view of the evidence warranted; justice under law required a remission of the excess, and can be satisfied with nothing less. Ample power of such determination is granted this court under *Section 2106, Title 28, of the United States Code.*

The questions then are: were pecuniary damages for $125,000 for the injuries sustained by the plaintiff fairly warranted by any view of the substantial evidence in this case? If not, what was the maximum amount so warranted? If compensation for impaired earning power be assumed as one element of damages, it should not be such a sum as would earn a return equal to the value of this lessened ability, leaving the principal sum intact at plaintiff's death, but should be a sum that would purchase an annuity equal to this return during the probable life of the plaintiff, calculated from reliable statistics upon the average duration of human life. Let us approach the problem from this aspect.

The appellee testified that at the time of his injury he was making about two hundred dollars every two weeks, having been given a raise in wages to $1.10 per hour. Both he and his present employer testified that at the time of the trial he was working at a filling station and making from $80 to $90 per month. If the jury accepted Allbritton's own testimony, it was their duty to award him damages sufficient to compensate him for the pain and suffering endured by him, for the necessary medical and hospital expenses incurred by him, and for an additional sum that would represent the cash value of what by reason of his injury he was deprived of earning during the remainder of his life. He was 34 years old at the time of his injury, and, according to an annuity table introduced by him, he had a life expectancy of 38.28 years, though according to the Commissioners 1941 Standard Ordinary Mortality Table, which was effective in Texas and 45 other states at

this time, he had an expectancy of only 34.29 years. While he testified that he was earning $200 every two weeks, he also testified that his hourly wage had recently been raised to $1.10. Therefore, if he worked 56 hours per week, and received time and a half for those hours over 40, and double time for his Sunday work, his total pay would be only $149.60 every two weeks.

It is proper to consider a person's decreasing earning capacity as the years go by, especially one who had only a fourth-grade education and whose work was restricted to manual labor. It is difficult to believe that Allbritton, doing hard manual labor, could have worked eight hours a day, seven days a week, for the rest of his life. The Biblical standard of a six-day work-week, with the Sabbath as a day of rest, has long been proven to be the most effective economical schedule that mankind can adopt. If appellee could be expected to perform manual labor for 40 hours per week at $1.10 per hour, he would receive a total of $2288 per year. He now earns $960 per year working in a filling station, but let us disregard that on the theory that the jury may have found him to be not able to work. We cannot presume that prevailing interest rates will remain uniformly low for 34 or 38 years. Under the present judgment, if the $111,915.30 award were invested at 3%, Allbritton would receive $3357.46 a year for the rest of his life and still have his $111,915.30 at the end of 38 years.

In 13 Tex. Jur. 184, the Texas law is stated to be that the allowance should not be such sum as would yield an annual return corresponding with the annual value of his lessened ability, leaving the principal sum still belonging to the estate of the plaintiff after his death, but should be an amount that would purchase an annuity equal to his loss of earnings during his expectancy calculated upon a reliable basis as to the average duration of human life. It should also be noted that nowhere has it been taken into account that this judgment is not subject to income taxes, whereas a part of his wages would have been, and a substantial portion of the same might have been used to pay taxes, especially as the years progressed and his depend-

ents became self-supporting. According to the Commissioners 1941 Standard Ordinary Mortality Table, $63,096.18 would purchase for a man 34 years of age an annuity that would pay him $2,288 for life, only the earned-interest portion of which would be subject to income taxes. If to this amount we add $10,000 for pain and suffering, plus $6,500 for hospital and medical bills, we have $79,596.18, which would leave the verdict manifestly excessive (inordinately excessive if you please).

Another view of the award is this: If the $111,915.30 allowed by the majority opinion were invested at 2½%, Allbritton would receive $2797.88 annually for the rest of his life, and leave intact at his death the full amount originally received. This yearly income of $2797.88 is $509.88 more than the previously mentioned $2288 that Allbritton might make if he worked 40 hours per week for the rest of his life. This clearly is against the Texas law as above set forth in *13 Tax. Jur. 184.*

There is a serious conflict within this circuit, and among the various circuits, as to the correct legal approach by an appellate federal court to the question of excessive damages in personal-injury litigation. This case was argued and submitted to a court of three judges on May 17, 1950; it was re-argued and re-submitted to the court en banc on November 17, 1950, and decided on February 15, 1951. Did the court fail to exercise fully the appellate jurisdiction granted it under *Sec. 2106, Title 28, of the U. S. Code*? D'd the majority agree on the legal and constitutional principles applicable to the issue of manifestly excessive damages? Was there agreement as to the rules of the common law according to which the facts in evidence might be re-examined? Did the court re-examine the facts as permitted by the 7th Amendment, or examine the discretion of the trial judge to see if its was abused as some of the cases indicate is the rule? Did it re-examine the facts to ascertain whether the verdict was manifestly excessive, or whether the jury was actuated by bias, passion, or prejudice, in rendering a manifestly excessive verdict? Did the court, as has so often been held, deem itself without jurisdiction to call on the plaintiff for a remittitur or to

order a reversal for any error of fact committed by the jury in awarding merely manifestly excessive damages?

These and other questions crowd upon us and remain unanswered. It may be that the decision of the issue as to excessive damages in this case turned upon the correct or incorrect approach of the individual judges to the question. Were they approaching the problem unfettered, like the judges of the Court of King's Bench in 1791 in superintending the courts of nisi prius, or did they deem themselves restrained from so doing by a constitutional provision? The statutory provision against reversals in jury cases for any error in fact remained on the books for 159 years; and, during that period, the federal courts lost the use of an ancient common-law appellate power. This power, in our opinion, may be compared to an arm that has become atrophied; even legislation like said Sec. 2106 cannot fully restore it; only a decision of the Supreme Court can cure it completely.

Finally, it cannot be denied that the procedural common law of England on the 15th of December, 1791, was in a state of flux. In 1766, Lord Mansfield said that he had no doubt but that it might be right to give an opportunity of reconsidering a verdict where excessive damages had been given, but that the present case did not dissatisfy him. 3 Burr. 1846 (KB). 97 Eng. Rep. 1130. The reporter, Burrow, says: "Mr. Justice Ashton concurred. He was very full in vindicating the discretion of the court to grant new trials even when the damages were ideal: and cited the case of *Wood* v. *Gunston*" (By ideal are meant those damages not capable of exact ascertainment, like pain and suffering. *Beardmore* v. *Carrington* (1764), 2 Wils 244). In 1786, in *Bucker* v. *Wood*, in King's Bench, 1 Term Reports 277, 99 Eng. Rep. 1092, Lord Mansfield said that there was no doubt but that the court had the power to take the opinion of a second jury in any case where the damages were excessive; yet in 1792 the court reverted to the strict view. In the case of *Duberley* v. *Gunning*, May 8, 1792, 4 Term Reports 652, 100 Eng. Rep. 1226, the court refused to grant a new trial on the ground of excessiveness of damages, stating that it could not be done. Justice Ashton dissented. Perhaps the

case may be explained on the ground of the nature of the action, because the same court, on May 7, 1793 (both decisions by Lord Kenyon), pointed out that the court was not unanimous in the *Duberley* case, which it said was sui generis. The court then proceeded to grant a new trial in an assault and battery case, in which damages were excessive. Jones v. Sparrow (1793) 5 Term Reports 257, 101 Eng. Rep. 144.

Chitty, in his work on Blackstone (Vol. 3, p. 306) footnotes Blackstone's statement with "for excessive damages indicating passion or prejudice." Chitty's statement is supported by Beardmore v. Carrington (1764), 2 Wils 244, but from the statement in Book III, page 388, of his Commentaries, it does not appear that Blackstone so interpreted the case of *Wood* v. *Gunston*, nor did Lord Mansfield. All of this points to the correctness of the following statement in *Galloway* v. *United States*, 319 U. S. 372, beginning at page 390:

> "The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were 'the rules of the common law' then prevelant, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries. In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England. And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form. In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.
>
> "This difficulty, no doubt, accounts for the amor-

phous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

See Southern Pac. Co. v. Guthrie, — F. (2) —, decided January 15, 1951, by the Ninth Circuit, en banc, which has come to our attention since this dissent was written, and wherein the court said, in note 11 of its opinion, that the victim of an excessive verdict, not the result of passion or prejudice, and not monstrous or grossly excessive, is entitled to relief at the hands of the trial judge; and that the power of the judge to grant such relief is an essential part of trial by jury under our system. To this let us add the following: Under Section 2106 of New Title 28, U. S. Code, what was said by the Supreme Court in *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, with reference to the power of trial courts to set aside verdicts and grant new trials, now applies to appellate federal courts, viz:

"Trial by jury, in the primary and usual sense of the term at the common law and in the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts, and (except on acquittal of a criminal charge), to set aside their verdict if in his opinion it is against the law or the evidence."

So far as they affected jury trials, six little words in the Judiciary Act of 1789[21] survived the vicissitudes of many legislative changes, and for over a century and a half escaped the sickle of revisors, codifiers, rule makers, and law makers, but finally they succumbed to the deft touch of the 1948 codifiers in their "Schedule of Laws Repealed": and all the king's horses and all the king's men cannot put them back again in their little niche without an Act of Congress; but the Seventh Amendment remains intact, and champions of the jury system have nothing to fear if the federal courts will adhere to the essential principles of trial by jury at common law, in 1791, as required by said Amendment.

McCord, Circuit Judge, Concurs.

[21] "Or for any error in fact." 28 U.S.C. 879; R.S. 1011; 1 Stat. 318.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 201

SUNRAY OIL CORPORATION, *Petitioner*,

v.

G. T. ALLBRITTON, *Respondent*

REPLY TO PETITION FOR CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now G. T. Allbritton, Respondent, and respectfully presents his reply contesting the petition for certiorari:

Thesis of Reply

I. No constitutional question is raised, for the reason that the verdict is not excessive. Earlier Texas decisions sustaining awards for lesser amounts are authoritative for the present judgment, when analysed in the light of the changed

economic picture, for their precedent limits should expand in the proportion that Allbritton's earnings are greater. A summary is made of the appalling and almost unprecedented injuries, the number, type and extent of which cause one to marvel that the man survives.

II. The change in the New Judicial Code, 28 U. S. C. A. 2105 and 2106, according to the Revisers' Notes, is to approve appellate review of fact findings in *non-jury* cases, but to make no effort toward statutory change contrary to the Seventh Amendment.

III. It is well settled by this court that the Seventh Amendment prohibits appellate review of a jury's award of damages.

IV. As Allbritton was a *business invitee* on Sunray's premises, Respondent owed him the duty to exercise reasonable care to make and keep the premises in a safe condition. This included instrumentalities and equipment furnished by Sunray.

First Counterpoint

(Germane to Petitioner's Specification of Errors 1, 2, 3, and 4)

As the damage award is not excessive, no constitutional question is presented.

Statement, Argument and Authorities Under First Counterpoint

To raise a constitutional question, Petitioner moves upon the premise that the damage award is excessive. Respondent shows the premise false, for the award is to be measured in the light of the decreased earning power of the dollar, rising costs of living, and increased earnings of workmen. ERWIN v. WELBORN, 207 S.W. 2d 124 (w.e. ref.); SOUTHERN PACIFIC CO. v. ZEISNESS (9th Cir.), 163 Fed. 2d 453.

This court has declared that $80,000.00 was not a "monstrous" award for the loss of a leg. AFFOLDER v. NEW YORK C. & ST. L. R. Co., 339 U.S. 96, 70 S. Ct. 509. And Your Honors have refused certiorari where a verdict of $100,000.00 was awarded a man 59 years of age for loss of a leg. SOUTHERN PACIFIC CO. v. GUTHRIE, 180 Fed. 2d 295, on motion for rehearing 186 Fed. 2d 926 (cert. den.—U.S.—, 71 S. Ct. 614.)

For comparison, the more extensive and crippling injuries sustained by Allbritton are here enumerated:

(1) Fracture through the body of the fourth lumbar vertebra. "A large piece carrying with it the entire spinal column above is displaced over to the right." (R. 31, Plaintiff's Ex.5, R. 30B). Prior to surgery, "mechanically he lost all support of his spinal column", it "was absolutely flexible" (R. 215). "From a mechanical standpoint, if nothing is done, the man would be unable to stand erect." (R. 215.)

(2) Fractures through the articular processes on the left and through the pedicle of the fourth lumbar vertebra (R. 31, Plaintiff's Ex. 5).

(3) Fracture of the fifth lumbar vertebra "through the superior process on the right." (R. 31, Plaintiff's Ex. 5, R. 30B.)

(4) A "comminuted fracture of the body which is split into a number of fragments and compressed from above down." (R. 31, Plaintiff's Ex. 5, R. 30B.) One-half of the fourth lumbar vertebra was knocked from its normal site down to the crest of the ilium (R. 49, Plaintiff's Ex. 5, R. 30B). "Split into a number of parts." (R. 38.)

The parts separated "at least an inch and one-half." (R. 37, 215.)

(5) The fourth lumbar was "crushed until there is very little left between the body above and the one below." (R. 32, Plaintiff's Ex. 5, R. 30B.)

(6) "A good deal of the bone is shoved considerably forward toward the abdominal cavity, and the vertebral column or spinal column above the point of the break is also shoved forward." (R. 32, Plaintiff's Ex. 5, R. 30B.)

(7) Surgery into the spine at the fifth lumbar vertebra disclosed: "This was just one mass of fragments—it was impossible to identify these various fragments." (R. 217.)

(8) Fracture of the seventh rib. Fracture of the eighth rib. Another fracture of the eighth rib near the spinal column. Fracture of the ninth rib near the spinal column (R. 32, Plaintiff's Ex. 2, R. 30A).

(9) Plaintiff's chest was punctured with hemorrhage into the lung (R. 32, Plaintiff's Ex. 2, R. 30A). Dr. Barker said "Possibly an actual tear of the lung tissue." (R. 216.)

(10) "The spinal canal is separated approximately one inch from its normal site." (R. 37, Plaintiff's Ex. 9, R. 36A). There was an abnormal offset of the canal (R. 215.)

(11) "The fourth and fifth transverse processes on the left were fractured and widely separated." (R. 47, Plaintiff's Ex. 5, R. 30B.)

(12) "There is considerable obligeration of the left sacro iliac joint." (R. 47, Plaintiff's Ex. 5, R. 30B.)

(13) Lung adhesion "To the dome of the right diaphragm from the lateral chest wall." (R. 42.)

(14) Hemorrhage from the lung as late as May, 1949 (R. 42).

(15) "There was apparently some weakness of the muscles of the lower extremities. There was some dropping of sensation of certain areas in the lower extremities." (R. 212-213). "We know from the clinical findings he had nerve damage. He had weakness of certain muscle groups." (R. 222.)

The surgeon witness, Dr. W. E. Barker, testified, without being contradicted, that Allbritton was permanently and totally disabled. (R. 219-220.) Respondent was earning $225.00 every fifteen days at regular employment (R. 82), which was better than $400.00 per month (R. 67). After the completion of the Sunray job he was to be advanced to a driller with pay of $600.00 per month (R. 66-67). At the time of his injuries Allbritton was only thirty-four years of age (R. 229.)

It is respectfully urged that these injuries, with the necessarily resulting pain and suffering, and the great economic loss to Respondent because of his total and permanent incapacity to earn money be viewed in the light of the present economic picture.

On this principle verdicts in earlier days on earnings of $400.00 per year are authority today, when annual wages are $4800.00, or twelve times as great, for sustaining verdicts in the same ratio increased.

There are early Texas decisions sustaining verdicts for $10,000.00, for $15,000.00, and for $30,000.00, which at first blush seem to hold a verdict for $125,000.00 far out of line. However, when we examine the economic structure behind the decisions and it is seen that the earnings were respectively $400.00 *per year* in 1899, $600.00 *per year* in 1901 and $1,200.00 *per year* in 1903, it is readily apparent that the holdings are actually authority for sustaining the award of $125,000.00 *in 1949 when the wage supporting it is twelve times that of 1899, eight times that of 1901, and four times that of 1903. A verdict to attain true uniformity and to justly compensate in 1949, must be proportionately greater and commensurate with today's prevailing wage scale and economic background.*

We respectfully urge Your Honors' application of this principle. In so doing note the decision in 1899 by the Texas Supreme Court in MISSOURI-PAC. RY. CO. v. LEHMBERG, 75 Tex. 61, 12 S.W. 838. There a man, the same age as Allbritton, was instantly killed. He was making only $400.00 *per year.* Allbritton was making twelve times as much, or $4,800.00 per year. The Court there sustained a death award, with no pain and suffering nor medical bills, in the amount of $10,000.00. Therefore, a mathematical comparison ($10,000.00 x 12) would give $120,000.00 without allowance for medical expenses or pain and anguish. We think this thoroughly illustrates the point.

Let us compare also the opinion in 1901 in G. H. & S. A. RY. CO. v. NEWPORT, 65 S.W. 657 (w.e. ref.). There plaintiff lost a leg. He was earning only $600.00 *per year.* An award of $15,000.00 was held not excessive. Allbritton's earnings of $4,800.00 per year are *eight times as much* and his medical expenses *thirty times more.* If $15,000.00 was not excessive on Newport's earning, 8 x $15,000.00, or

$120,000.00 is not excessive for Allbritton's eight times as much.

And in 1903 an award for $30,000.00 was held not excessive for serious injuries in TEXAS & N. O. R. Co. v. KELLY, 80 S.W. 1073 (w.e. ref.). Plaintiff was 54 years old, earning approximately $100.00 per month. Without allowing for the difference in age, under this authority, Allbritton, earning *four times as much* would be entitled to $120,000.00 ($30,000.00 x 4). The strength of the authority to sustain our verdict is more manifest when it is noted that Kelly was *twenty years older* than Allbritton.

Were this an action by Sunray Oil Corporation for the negligent destruction of several tanks of oil, decisions in 1901 sustaining awards for loss of oil when it sold for 18c per barrel would not be authority for confining a present day recovery to that earlier limit when oil today sells for $2.50 to $3.00 per barrel.

Similarly, as we have pointed out above, decisions approving personal injury verdict for $15,000.00, $20,000.00, $30,000.00 are meaningless until they are analysed to learn the wage scale that supported them. So a precedent for a $30,000.00 verdict for comparable injuries based upon a wage scale of $100.00 per month is authority for upholding a verdict for $120,000.00 when the earnings are four times as great. To limit a man's recovery to an amount approved in an earlier case based upon one-fourth as much value loss would be to reject the substance and true meaning of the precedent.

In the additional Texas cases to follow we show the verdict sustained and the wage earnings involved; we then multiply the verdict by the ratio in which Allbritton's earnings of $400.00 per month are greater, thereby determining the amount the prior decision sustains in view of the changed

economic picture. These are all cases with injuries and other facts of a comparable nature.

Sabine & E. T. R. Co. v. Ewing (1894), 26 S.W. 638 (w.e. ref):

Verdict for $20,000.00 on a $60.00 per month wage. $20,000.00 x 6.6 gives $132,000.00.

Galveston H. & S. A. R. Co. v. Hynes (1899), 50 S.W. 624 (w.e. ref.):

Verdict for $18,000.00 on a $50.00 per month wage. $18,000.00 x 8 gives $144,000.00.

Missouri K. & T. Ry. v. Bailey (1909), 115 S.W. 601 (w.e. ref.):

Verdict for $18,000.00 on a $50.00 per month wage. $20,000.00 x 8 gives $160,000.00.

Texas & Pacific Ry. Co. v. Matkin (1912), 142 S.W. 604:

Verdict for $35,000.00 on a $100.00 per month wage. $35,000.00 x 4 gives $140,000.00.

Decatur Cotton Seed Oil Co. v. Belew (1915), 178 S.W. 607 (w.e. ref.):

Verdict for $20,000.00 on a $50.00 per month wage. $20,000.00 x 8 gives $160,000.00.

Beaumont, S. L. & W. Ry. Co. v. Sterling (1924), 260 S.W. 320:

Verdict for $62,400.00 on $200.00 per month wage rate. $62,400.00 x 2 gives $124,800.00. (Note that this man was eight years older than Allbritton.)

T. & N. O. Ry. Co. v. Haney (1940), 144 S.W. 2d 677:

Verdict for $30,000.00 sustained on motion for rehearing on $70.00 per month wage rate. $30,000.00 x 5.7 gives $171,000.00.

Texas Co. v. Ivey (1941), 154 S.W. 2d 694:

> Verdict for $26,952.00 on a $90.00 per month wage rate. $26,952.00 x 4.4 gives $118,588.00. (Note that this man was fifteen years older than Allbritton.)

And it is important to note the recent Texas case of THOMPSON v. BARNES, 236 S.W. 2d 656, in which a verdict for $85,000.00 was upheld for injuries of a much lesser degree for a man approximately twenty years older than Allbritton and earning a similar wage.

Analogous injuries were sustained in ST. LOUIS RY. CO. v. FERGUSON (8th Cir.), 182 Fed. 2d 949, where the Court of Appeals for the Eighth Circuit sustained a verdict for $150,000.00. Ferguson was fifty years of age and earning only $250.00 to $275.00 per month. *Allbritton is sixteen years younger. His past earnings and prospective increase were much greater.*

Of strong persuasion is the Texas case of CITY OF HOUSTON v. SCHILLING, 235 S.W. 2d 921, (affirmed June 16, 1951, —Tex.—, —S.W. 2d—, 20 Tex. Sup. Ct. Rep. 507), in which the Court affirmed a judgment for $61,000.00 for a woman 53 years of age, earning approximately $250.00 per month. When it is considered that Allbritton was 19 years younger and earning nearly twice as much, with promise of immediate advancement, this case is authority for sustaining the judgment in the present cause.

Cases settled without trial, or judgments discharged without appeal, though not of case book authority, are still precedent, for they show the practicing attitude of the trial bench and bar and the scale set by litigants at issue.

Therefore, note the case of JAMES L. ROUT v. STONE OIL CO., ET AL., No. 72,953, 56th Judicial District, Galveston County, Texas, which was settled by court judgment on the

21st day of June, 1950, for $152,000.00 for disabling and disfiguring burns.

See also, L. A. PICKETT v. T&NO R. Co., No. 350,204, 127th Judicial District Court, Harris County, Texas, in which plaintiff, 61 years of age, and earning $4,000.00 per year, recovered a judgment for $86,000.00, which was settled for $81,000.00 after motion for new trial. Allbritton, 27 years younger, was earning more, with immediate prospects of wage advancement. Consequently, this case supports the judgment being considered.

It is respectfully submitted that the verdict is not excessive and that the constitutional issue, therefore, is not raised.

Second Counterpoint

(Contesting Petitioner's Specification of Errors 1, 2, 3, and 4)

The new judicial code did not intend to remove the limitation on Appellate review of fact findings by a jury.

Statement, Argument and Authorities Under Second Counterpoint

It is suggested by Petitioner that the omission from 28 U. S. C. A. 2105 of certain language formerly contained in 28 U.S. C. A. 879, evidences the intent of Congress to remove the limitation theretofore enforced on the Federal Appellate courts. In reply to this, attention is called to the Reviser's Notes to the new section of the statute:

> "The revised language is substituted for the provisions of said Section 879 to avoid any construction that matters of fact are not reviewable in *non-jury* cases." (Emphasis ours.)

And Congress recognized that this was the limit of the change by including in its reports the complete Reviser's Notes. See the article by Hon. Wm. M. Barron, Chief Reviser of Title 28, U. S. C. A., reported in 8 F.R.D. 445-446, where he says in complete support of our contention:

> "Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.
>
> "Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> "Congress recognized this rule by including in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor."

This Court has expressly ruled that the Reviser's Notes are authoritative on the intent of Congress in adopting the new Judicial Code. UNITED STATES v. NATIONAL CITY LINES, 337 U.S. 78, 69 S. Ct. 955; we quote the language of CHIEF JUSTICE VINSON:

> " * * * the Government urges us to disregard the reviser's notes which were printed in the House Reports. We cannot accept this position for the reasons discussed in our previous decisions today. *The reviser's notes are so obviously authoritative in perceiving the meaning of the Code*, that the Government itself, in discussing a section other than Sec. 1404(a), refers to them in its brief in this case. And we have already had occasion to look to the reviser's notes. Stainback v. Mo

Hock Ke Lok Po, 1949, 336 U.S. 368, 376, n. 12, 69 S. Ct. 606, 610." (Emphasis ours.)

To show that the code was merely to codify *existing* law see the comment by Hon. Clarence G. Galston, Member Judicial Conference Committee on Revision of the Judicial Code, in 8 F.R.D. 201:

> "As the title of the bill indicates, the object of the Committee was to revise and codify existing law. The temptation in so doing to incorporate new matter was at times very great; but the rule of exclusion stated in its broadest terms was to reject anything of a controversial nature. In consequence the bill as it was introduced in the closing days of the second session of the 79th Congress expressed the efforts of the draftsmen to simplify, consolidate, re-arrange, re-phrase and indeed streamline former Title 28."

A thorough treatment of the intent to retain *existing* law, except where indicated otherwise in the Reviser's Notes, is found in GULF RESEARCH & DEVELOPMENT CO. v. SCHLUMBERGER WELL SURVEYING CORP., 92 Fed. Supp. 16; we quote a brief statement:

> "The new Federal Judicial Code is nothing more or less than a *revision and restatement of existing law. Where any change is made it appears in the Reviser's Notes.*" (Emphasis ours.)

This is but application of settled principles. See UNITED STATES v. RYDER, 110 U.S. 729, 4 S. Ct. 196, where the Supreme Court decrees:

> "It will not be inferred that the legislature in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed."

The existing law at the time of the adoption of the new Judicial Code was to limit review of jury fact findings on a Constitutional basis. The Reviser's Notes express an intent of change only for certainty of review of court findings in *non-jury* cases. It therefore follows, under the authorities cited, that no change was intended as to review of jury findings. This is borne out by the statement co-authored by Hon. Wm. M. Barron, Chief Reviser of Title 28 U.S.C.A., in Barron and Holtzoff: FEDERAL PRACTICE AND PROCEDURE (1950), Vol. 2, 1122, p. 809, published subsequent to the adoption of the new Judicial Code, wherein the Constitutional limitation in jury cases is still expressly recognized:

> "The principle that in a law action the question of damages cannot be re-examined in an appellate court for excessiveness or insufficiency still applies in jury cases because of the Seventh Amendment to the United States Constitution, * * *."

Third Counterpoint

(Contesting Petitioner's Specification of Errors 1, 2, 3, and 4)

The history and interpretation of the Seventh Amendment establish a settled rule prohibiting appellate review of fact findings by a jury.

Statement, Argument and Authorities Under Third Counterpoint

To know the purpose and import of the limitation imposed by the Seventh Amendment, and the framers' conception of the common law rules, it is material to determine the origin of the provision and the circumstances existing at the time of its adoption. Certain outstanding historical factors cogently evidence jealous concern for preservation

of jury trial and the Constitutional intent to limit review of fact findings by a jury in a common law action:

The final draft of the Constitution, as transmitted from the Constitutional Convention to the Congress under date of September 17, 1787, provided for appellate jurisdiction as follows, Article III, Sec. 2:

> "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, *both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.*" (Emphasis ours.)

It is a matter of common historical knowledge that the proposed Constitution was thereupon widely debated and discussed in public and private. In THE FEDERALIST PAPERS (No 81), Hamilton, advocate of adoption of the document as originally written, points out the strong opposition to the above quoted provisions allowing appellate review of matters of fact:

> "The propriety of this appellate jurisdiction has been scarcely called in question in regard to matters of law; *but the clamors have been loud against it as applied to matters of fact.*"

Hamilton then comments that prominent men considered the provision an adoption of civil law procedure as distinguished from common law rules:

> "Some well-intentioned men in this State, deriving their notions from the language and forms which obtain in our courts, have been induced to consider it as an implied supersedure of the trial by jury, in favor of the civil-law mode of trial, which prevails in our courts of admiralty, probate, and chancery."

He then argues that the objections are not well taken and that the appellate review of both law and fact should remain in the Constitution, subject to such exceptions as may be made by statutory enactment:

> " * * * It will not answer to make an express exception of cases which shall have been originally tried by a jury, because in the courts of some of the States *all causes* are tried in this mode; and such an exception would preclude the revision of matters of fact, as well where it might be proper, as where it might be improper. To avoid all inconveniences, it will be safest to declare generally, that the Supreme Court shall possess appellate jurisdiction both as to law and *fact*, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security." (Emphasis Mr. Hamilton's.)

Finally, to meet the objections, Hamilton suggests a *legislative* enactment that would limit appellate review in common law cases according to common law rules:

> " * * * The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized exception; but if, for the reason aleady intimated, it should be thought too extensive, it might be qualified with a limitation to such causes only as are determinable at common law in that mode of trial."

All of this evidences the debate on, and concern for, the question. So it is then of powerful persuasion that subsequent to the debates the people and States in 1789-1791

did not leave the limitation to legislative discretion but incorporated it into the Constitution in the Seventh Amendment. The effect of this Amendment was to change Article III, Sec. 2, and to take from Congress the power to make the exceptions and regulations of appellate review on matters of fact in jury causes at common law. It took Hamilton's proposal in substance but made it Constitutional instead of legislative and extended it to "any court of the United States." See the review of this matter and the Court's comments in JUSTICES v. MURRAY, 9 Wall. 274, 19 L. Ed. 658. An excellent review of historical matters is found also in CAPITAL TRACTION CO. v. HOF, 174 U.S. 1, 19 S. Ct. 580.

To show what were the rules of the common law, Mr. Justice Story made the following explanation in UNITED STATES v. WONSON, 1 Gall, 5, Fed. Cases No. 16,750;

> " ' Beyond all question, the common law here alluded to is not the common law of any individual state, for it probably differs in all, but it is the common law of England, the grand reservoir of all our jurisprudence.' * * * 'Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is pending, for good cause shown, or unless the judgment of such court is reversed by a superior tribunal on a writ of error, and a venire facias de novo is awarded. This is the invariable usage, settled by the decisions of ages.' "

Notice should be taken of the common law rule that the Court *en banc*, to which a motion for new trial was presented, was not an appellate court but a meeting of all the trial judges as distinguished from a court presided over by only one judge. BLACK'S LAW DICTIONARY (3rd Ed.) , p. 459. Review of the action of this Court on a motion for

new trial was not allowed at common law; review was established by statute in 1854, which even then denied review where the motion was on "Matter of Discretion only, as on the ground that the Verdict was against the Weight of Evidence or otherwise." Note (9) to FAIRMOUNT GLASS WORKS v. CUB FORK COAL CO., 287 U.S. 474, 53 S. Ct. 252.

Our trial courts are held to be of the rank of the English court *en banc* to which the motion for new trial was addressed; this necessarily follows from the long consistent line of decision. See FAIRMOUNT GLASS WORKS v. CUB FORK COAL CO., supra, and the many cases cited and discussed below.

The earliest Supreme Court decision we have found on the question is PARSONS v. BEDFORD, 3 Pet. 433, 7 L. Ed. 732. A bill of exceptions complained of the trial court's refusal on appellant's application to order the clerk to record the testimony. Of this application the Court said:

> " * * * The whole object, therefore, of the application to record the evidence, so far at least as this court can take cognizance of it, was to present the evidence here in order to establish the error of the verdict in matters of fact. * * * "

Consequently, the issue of the power of a Federal Appellate Court to review issues of fact tried by a jury was squarely presented. The Supreme Court then held the assignment immaterial for the reason that the Seventh Amendment prohibited re-examination of such fact question, as the common law prohibited it; we quote:

> "*But the other clause of the amendment is still more important, and we read it as a substantial and independent clause. 'No fact tried by jury shall be otherwise*

re-examinable in any court of the United States than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings." (Our emphasis.)

The same question was before the Supreme Court in PHILLIPS v. PRESTON, 5 How. 278, 12 L. Ed. 152, and relying upon PARSONS v. BEDFORD, supra, it reaffirmed the rule as based on the Constitution.

This Court redeclared the doctrine in BARREDA v. SILSBEE, 21 How. 146, 62 L. Ed. 86, where the Court rules as follows:

> " * * * Whether the jury were warranted in so finding or not, is not a question for an appellate tribunal. That question cannot be re-examined by this court. For the purpose of any examination of the case which it is competent for this court to make *under the Constitution of the United States and the laws of Congress, it must be assumed that the facts of the case have been correctly found by the jury.*" (Emphasis ours.)

In MERCANTILE MUTUAL INS. CO. v. FOLSOM, 18 Wall. 237, 21 L. Ed. 827, the Court interpreted the common law rule as follows:

> "Facts found by a jury could only be re-examined under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award

of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. * * * ."

Then, in NEW YORK CENTRAL AND H. R.R. Co. v. FRALOFF, 100 U.S. 24, 25 L. Ed. 531, the issue was raised specifically on the power to remit damages. Again adhering to limitations which it held were imposed by the Constitution this Court ruled:

> " * * * No error of law appearing upon the record, *this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount.* * * * Whether its action, in that particular was erroneous or not, *our power is restricted by the Constitution to the determination of the questions of law arising upon the record.*" (Emphasis ours.)

Citing the FRALOFF case, supra, which decreed a constitutional limitation, the Court again announced the principle in WABASH RY. CO. v. MCDANIELS, 107 U.S. 454, 2. S. Ct. 932. It there said:

> "*That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted.* Whether the order overruling the motion for new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record." (Emphasis ours.)

As the opinion relies upon the FRALOFF case, supra, it necessarily follows that it is reaffirming the prohibition of the Seventh Amendment.

In METROPOLITAN R. CO. v. MOORE, 121 U.S. 558, 7 S. Ct. 1334, the Court, in a dictum, stated that the prohibition

was constitutional. The case of ARKANSAS VALLEY LAND & CATTLE CO. v. MANN, 130 U.S. 69, 9 S. Ct. 458, refused to review the act of the trial Judge in requiring a substantial remittitur. It cited the PARSONS, FOLSOM, and FRALOFF cases, supra; as the cases announced the constitutional limitation, the Supreme Court is here again reaffirming that interpretation.

In CITY OF LINCOLN v. POWER, 151 U.S. 436, 14 S. Ct. 387, the Appellant presented the complaint that the trial Judge had refused to disturb a verdict alleged to be excessive. The Court quoted with approval the language we have quoted from PARSONS v. BEDFORD, supra, and NEW YORK CENTRAL AND H. R. R.R. CO. v. FRALOFF, supra, and thus again pronounced a *Constitutional* limitation.

The Court again had the question of reviewing a verdict in TEXAS & PACIFIC RY. CO. v. BEHYMER, 189 U.S. 468, 23 S. Ct. 622; WATERS-PIERCE OIL CO. v. DESELMS, 212 U.S. 159, 29 S. Ct. 270; and SOUTHERN RY. v. BENNETT, 233 U.S. 80, 34 S. Ct. 566. In each case it held it could not consider the question, citing CITY OF LINCOLN v. POWER, supra, which had in turn reaffirmed the Constitutional limitation. The amount of the verdict was raised in ST. LOUIS, IRON MOUNTAIN & S. RY. CO. v. CRAFT, 237 U.S. 648, 35 S. Ct. 704. The Court ruled that the power to deal with a jury verdict lay in the trial Judge, citing the FRALOFF case, supra, and thus reaffirming the Constitutional limitation therein announced. Connecting with these decisions is the opinion in LOUISVILLE & N. R. CO. v. HOLLOWAY, 246 U.S. 525, 38 S. Ct. 379, which refused review of a jury's damage award, citing SOUTHERN RY. v. BENNETT, supra.

The Constitutional limitation is pointed out and enforced in FAIRMOUNT GLASS WORKS v. CUB FORK COAL CO., 287 U.S. 474, 53 S. Ct. 252.

As late as 1947 we find Your Honors again referring to the *Constitutional* limitation on judicial review of fact findings by juries. UNITED STATES v. UNITED STATES GYPSUM CO., 333 U.S. 364, 68 S. Ct. 525:

> "Since judicial review of findings of trial courts does not have the statutory or *constitutional limitations of findings * * * by a jury.*" (Emphasis ours.)

It is thus evident that the Supreme Court has consistently placed the limitation on a Constitutional footing. See also AETNA LIFE INS. CO. v. WARD, 140 U.S. 76, 11 S. Ct. 720; WILSON v. EVERETT, 139 U.S. 616, 11 S. Ct. 664; NEW YORK L. E. & W. R. CO. v. WINTER, 143 U.S. 60, 12 S. Ct. 356.

Petitioner suggests that the opinion of KENNON v. GILMER, 131 U.S. 22, 9 S. Ct. 696, is contrary to the cases we have discussed and that it did not enforce the limitation of the Seventh Amendment as it allowed the Supreme Court of the *Territory* of Montana to re-examine the amount of a jury's damage award. Such suggestion overlooks that the Supreme Court was there approving the power of a *Territorial* Court of Appeal in the *Territory* of Montana to review a damage award; the opinion was not dealing with the power of a "Court of the United States," which is a Constitutional Court. The two are distinctly different in so far as the limitation on powers and jurisdiction are concerned.

The Seventh Amendment in limiting review expressly refers to any "court of the United States." It has been repeatedly held in old and recent cases that a "Territorial Court" is not a "Court of the United States." THE AMERICAN INS. CO. v. 356 BALES OF COTTON, 1 Pet. 511, 26 L. Ed. 242. ("These courts, then, are not Constitutional Courts, in which the Constitutional power conferred by the Con-

stitution on the general government can be deposited".) BENNER v. PORTER, 9 How. 235, 13 L. Ed. 119. ("The Territorial Courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal government could be deposited."); GOOD v. MARTIN, 95 U.S. 90, 24 L. Ed. 341. ("Territorial Courts are not Courts of the United States, within the meaning of the Constitution, as appears by all the authorities"); and see the extensive review of the authorities on the point in MCALLISTER v. UNITED STATES, 141 U.S. 174, 11 S. Ct. 949.

The cases of GALLOWAY v. UNITED STATES, 319 U.S. 372, 63 S. Ct. 1077, and DIMICK v. SCHEIDT, 293 U.S. 474, 55 S. Ct. 296, are not in point for they are concerned with the first clause of the Seventh Amendment governing trial by jury in the trial courts, the former treating the power of a trial Judge to instruct a verdict and the latter his power to grant an additur. Appellate review of fact findings by a jury is proscribed in the second clause of the Seventh Amendment; this second clause is to be read "as a substantial and independent clause". PARSONS v. BEDFORD, 3 Pet. 433, 28 L. Ed. 732.

It is thus seen that this Court by a long line of decisions has established that the Constitution forbids appellate review of facts found by a jury, including the amount of a damage award.

Fourth Counterpoint

(Contesting Petitioner's Specification of Errors 5, 6, 7, 8, and 9)

As Allbritton was a "business invitee" on Sunray's premises, Petitioner owed him the duty to exercise reasonable care to make and keep the premises, and instrumentalities thereon, in a safe condition.

Statement, Argument and Authorities Under Fourth Counterpoint

The derrick that collapsed on Allbritton was erected on Sunray's premises about 1934 (R. 131). Allbritton alleged that he was a "business invitee" on the premises and under the derrick (R. 9). This was admitted by Petitioner. (R. 18-19.)

The applicable principle has been recently reaffirmed by the Supreme Court of Texas on January 11, 1950, in SMITH v. HENGER, 148 Tex. 456, 226 S.W. 2d 425:

> "The law places upon the owner or occupant of land the duty to use reasonable care to make and keep the premises safe for the use of persons invited to use the premises for business purposes. * * * Included within the class of persons to whom this duty is owed are the employees of contractors performing construction or other work on the premises * * * (citing cases)."

This duty extends to equipment and appliances on the premises that are furnished for use by the "invitee". HANSON v. PONDER (Com. App.), 300 S.W. 35; CONTINENTAL PAPER BAG CO. v. BOSWORTH (Com. App.), 300 S.W. 170; GULF, C. & S.F. RY. CO. v. IRICK, 116 S.W. 2d 1099 (w.e. dism.); HOUSTON BELT & TERMINAL RY. CO. v. ROGERS, 44 S.W. 2d 420 (w.e. dism.); MOREMAN GIN CO. v. BROWN, 291 S.W. 946. We quote from the IRICK case, supra:

> "And where it (the landowner) undertakes to, and does, furnish appliances for use of those properly upon its premises and invited to use them, the duty rests upon it to use ordinary care to furnish reasonably safe appliances for such purposes; and failure to do so constitutes negligence."

It is thus clear that the Court of Appeals properly interpreted the applicable Texas law on liability.

Conclusion and Prayer

It is respectfully submitted that the facts, argument, and authorities presented above show the petition for certiorari to be without merit.

WHEREFORE, Respondent prays that the petition be in all things denied.

Respectfully submitted,

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I, the undersigned certify that copies of this brief were delivered to attorneys of record for the Petitioner on the 23rd day of August, 1951.

J. Edwin Smith